

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

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|----------------------------------|---|-------------|----------------------------|
| <hr/> | |) | |
| UNITED STATES OF AMERICA and the |) | | |
| STATE OF MICHIGAN, |) | | |
| |) | | |
| |) | Plaintiffs, | |
| |) | | |
| |) | v. | Civil Action No. |
| |) | | 2:10-cv-14155-DPH-MKM |
| |) | | Hon. Denise Page Hood |
| BLUE CROSS BLUE SHIELD OF |) | | Mag. Judge Mona K. Majzoub |
| MICHIGAN, |) | | |
| |) | | |
| |) | Defendant. | |
| <hr/> | |) | |

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' SEALED MOTION TO
COMPEL THE PRODUCTION OF DOCUMENTS RESPONSIVE TO
PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS**

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TABLE OF AUTHORITIES

Cases

Jarvis v. Mich. Bell Tel. Co., No. 08-cv-12262, 2009 WL 2475581, *2 (Aug. 11 2009 E.D. Mich.)(Majzoub, M.J.).....2

Khami v. Ortho-McNeil-Janssen Pharm., Inc., No. 09-CV-11464, 2011 WL 1045545 (E.D. Mich. Mar. 17, 2011).....3

Osborne v. C.H. Robinson Co., Civ. No. 08-cv-50165, 2011 U.S. Dist. LEXIS 123168 (Oct. 25, 2011 N.D. Ill.).....2

In re Seroquel Products Liability Litig., 244 F.R.D. 650 (M.D. Fla. 2007).....2-3

Stokes v. Xerox Corp., No. 05-CV-71683, 2006 WL 6686584 (E.D. Mich. Oct. 5, 2006).....5

William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. 2009).....2*

Rules/Statutes

Fed. R. Civ. P. 26(g)(1).....2

Fed. R. Civ. P. 34.....1

15 U.S.C. § 4.....3

Secondary Authority

8A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2204 at 365 (2d ed.1994).....5

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

I. The Court Should Set a Schedule for BCBSM's Email Production

Blue Cross does not contest that seven months have now passed without BCBSM producing a single email in response to Plaintiffs' Second Request. Indeed, BCBSM does not intend to begin its review of email until April 2, *see* Def's Br. (Doc. #125) at n. 47, eight months to the day since plaintiffs served their August 2, 2011 document request. Only after plaintiffs moved to compel a production schedule did BCBSM—in mid-February—begin a partial collection of email.¹ Although BCBSM claimed that its partial collection process would be completed by March 9, BCBSM continues to refuse to commit to a date by which it will complete email production, *see* Def's Br. (Doc. #125) at 13, or even to provide an estimated date before June at the earliest.²

This Court's Scheduling Order provides that fact discovery closes July 25, 2012. *See* Doc. #67. BCBSM's delay disregards the Court's order and BCBSM's Rule 34 obligations and prejudices plaintiffs' ability to prepare for and complete depositions of BCBSM employees by the close of fact discovery. To complete those depositions during the time allowed by the Court, plaintiffs will be forced to start taking BCBSM employee depositions before receiving and reviewing the deponent's email.³

¹ BCBSM finally began running 31 (70%) of the proposed search strings on February 15, *see* Ex. 1, Ex. 2, three months after the parties reached substantial agreement on those search strings on Nov. 16, 2011. *Compare* Def's Ex. 8 to Doc. #125 *with* Ex. 3. Most changes since November 16 were to add root expanders to capture plurals, etc., which plaintiffs requested in September 2011. *See* Ex. 4.

² *See* Def. BCBSM's Omnibus Mot. for Prot. Order at 16 (Doc. #123) ("90 days after final search terms are agreed upon by the parties, Blue Cross will report its progress to the parties and provide its anticipated completion date").

³ Email produced during the pre-Complaint investigative process is insufficient. That email production covered fewer custodians and was gathered using limited search terms selected by BCBSM (without input from or timely disclosure to plaintiffs) which did not

BCBSM attempts to justify its delayed production of email by diverting the issue before the Court to search strings. Plaintiffs, however, have not moved the Court to order BCBSM to use specific search strings. Plaintiffs are continuing to engage in good-faith efforts to finalize the 13 search strings proposed by plaintiffs that are still under negotiation with BCBSM,⁴ but plaintiffs should not, as BCBSM's brief suggests, *see* Def's Br. (Doc. #125) at 8-10, have sole responsibility for proposing limiting terms.⁵ Nor should the Court countenance BCBSM's refusal to run certain search strings solely because of the large number of potential search results. The objective of a search using search terms is to locate relevant, not fewer, documents. Therefore, a search is not better just because it results in fewer documents.⁶

include terms such as "MFN", "MFD", "market share", or competitor names. *See* Def's Ex. 3.

⁴ *See, e.g.*, Ex. 5 (proposing ways to narrow remaining search strings); Ex.6 (addressing objections to two search terms).

⁵ BCBSM is in the best position to determine what words and abbreviations its personnel uses. *See William A. Gross Const. Assocs.*, 256 F.R.D. 256 F.R.D. 134, 136 (S.D.N.Y. 2009)("input from the ESI's custodians as to the words and abbreviations they use" necessary for crafting searches); *Osborne v. C.H. Robinson Co.*, Civ. No. 08-cv-50165, 2011 U.S. Dist. LEXIS 123168, at *14-16 (Oct. 25, 2011 N.D. Ill.)(fees awarded when defendant failed to identify terms that it knew would retrieve relevant information). Indeed, Fed. R. Civ. P. 26(g)(1) obligates BCBSM to make "reasonable inquiry" in responding to plaintiff's discovery requests. *Jarvis v. Mich. Bell Tel. Co.*, No. 08-cv-12262, 2009 WL 2475581, *2 (E.D. Mich. Aug. 11 2009)(Majzoub, M.J.).

⁶ The value of search terms is judged by the percentage of relevant documents they yield in comparison to false positives. This is calculated by examining a sample of the results from a proposed search string to determine whether there are, in fact, a large number of false positives, and the reasons for them. Plaintiffs have urged BCBSM to use this sampling technique, which has been recognized by many courts as necessary to an efficient e-discovery process. *See, e.g., William A. Gross Const. Assocs.*, 256 F.R.D. at 136 ("proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives'"); *In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007)("Common sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.").

A Court-imposed deadline is necessary for BCBSM to complete its collection and full production of responsive email on a schedule that takes into account the July 25 close of fact discovery and plaintiffs' need to prepare for and complete depositions of BCBSM employees by that date. Consistent with Congress's expressed intent that suits brought by the United States in antitrust actions proceed without delay, *see, e.g.*, 15 U.S.C. § 4, plaintiffs are committed to meeting the Court's schedule and to reaching an expeditious adjudication of this antitrust enforcement action, which seeks an injunction against ongoing harm to Michigan consumers.

II. BCN Documents Are in BCBSM's Control And Are Relevant

BCBSM also attempts to divert the control and relevance issues by invoking BCN's nominal nonparty status, while ignoring that BCN is BCBSM's wholly owned subsidiary. BCBSM does not cite a single case ruling that the documents of a party's wholly owned subsidiary like BCN are not within the parent party's possession, custody, or control.⁷ Nor does BCBSM deny any of the facts in plaintiffs' brief that establish its possession, custody, or control of BCN's documents.⁸ BCBSM now admits that its email archive houses all of BCN's email. Def's Br. (Doc. #125) at Ex. 1, ¶ 10).

Although BCBSM has run test searches that estimate the total number of search results, BCBSM has done no sampling to test for false positives or completeness and provides no reason why.

⁷ BCBSM relies on *Khami v. Ortho-McNeil-Janssen Pharm., Inc.*, No. 09-CV-11464, 2011 WL 1045545 (E.D. Mich. Mar. 17, 2011), but there, unlike here, the relevant request sought documents from "agents, affiliates, divisions, parents", *id.* at *2, not from a party's wholly owned subsidiary where the parent party has already demonstrated its ability to obtain the subsidiary's documents. *See* Plfs' Br. (Doc. #112) at 11.

⁸ These facts include that BCBSM owns 100% of BCN; it establishes the policies under which BCN operates; it retains oversight of BCN's operations; it appoints a majority of BCN's board of directors; it approves all BCN pricing policies, business plans, annual

Though BCBSM challenges the relevance of most of BCN's documents—other than those relating directly to MFNs—BCBSM does not challenge any of the key facts stated in plaintiffs' brief that establish their relevance. *See* Plf's Br. (Doc. # 112) at 15. BCBSM also ignores the fact that BCN offers an HMO commercial health insurance product that competes in the geographic markets alleged in the Complaint. BCBSM itself has pursued discovery from other Michigan commercial health insurers that goes far beyond documents relating directly to MFNs. *See, e.g.*, Ex. 7 at Schedule of Requested Documents ¶¶ 1-37.⁹ Such information cannot be relevant only when BCBSM subpoenas it from non-parties Humana, McLaren Health Plan, Physicians Health Plan, Priority Health, United Health, and others, but not when plaintiffs request BCN documents from BCBSM. BCBSM's own discovery of other insurers shows that plaintiffs' requests for BCN documents are relevant to more than just MFNs.¹⁰ Those requests are also relevant to health insurance competition and competitors, geographic markets, competitive effects of MFNs, and hospital contracting.¹¹

budgets, underwriting guidelines, and rating methods; it is the employer of BCN's employees; and it has already demonstrated its ability to produce BCN documents. *See* Plfs' Br. (Doc. #112) at 10-11.

⁹ Notably, in this non-party document subpoena served by BCBSM, the following definition appears: "The term 'BCBSM' means Blue Cross and Blue Shield of Michigan, including Blue Care Network." *See id.* at Ex. A.

¹⁰ BCBSM appears to claim that all BCN documents "concerning or discussing the use of MFNs" were produced in response to CID No. 25965. *See* Def's Br. (Doc. #125) at 16. However, collection for that CID production was completed in 2010, and it seems unlikely that no documents "concerning or discussing the use of MFNs" have been created since.

¹¹ BCBSM specifically challenges the relevance only of plaintiffs' request for BCN's annual update factor and underwriting policies. *See* Def's Br. (Doc. #125) at 16-17. The annual update factor is used to establish BCN's contractual reimbursement rates with hospitals. Establishing the contractual hospital rates of Michigan commercial health

Moreover, BCBSM has failed to cite any legal authority establishing that BCN's nominal non-party status is relevant to the analysis. BCBSM has control over the documents. "If documents are available from a party, it [is] preferable to have them obtained pursuant to Rule 34 rather than subpoenaing them from a nonparty." *Stokes v. Xerox Corp.*, No. 05-CV-71683, 2006 WL 6686584, at *3 (E.D. Mich. Oct. 5, 2006)(Majzoub, M.J.)(quoting 8A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2204 at 365 (2d ed.1994)). Requiring a subpoena of BCBSM's wholly owned subsidiary would be a needless formality.

III. CONCLUSION

The Court should order BCBSM to produce, by a date certain, all email and all BCN documents responsive to Plaintiffs' Second Request. Too much time has passed since August 2, 2011 when plaintiffs served their discovery on BCBSM.

Respectfully submitted,

/s/ with consent of Thomas S. Marks
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Attorney for the United States

Dated: March 12, 2012

insurers is central to plaintiffs' claims. BCN's underwriting policies will establish the relative importance of hospital costs in the development of BCN's prices and will also provide insight regarding BCN's pricing across geographic markets.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that on March 12, 2012 he served a copy of the foregoing REPLY BRIEF IN SUPPORT OF PLAINTIFFS' SEALED MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS in accordance with this Court's policies and procedures for service of electronically filed documents.

/s/ Ryan Danks
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ryan.danks@usdoj.gov

Exhibit 1

From: Cummings, Ashley [acummings@hunton.com]
Sent: Wednesday, February 15, 2012 1:35 PM
To: Matheson, Dan; Fitzpatrick, Amy
Cc: Dan Hedlund; Casey Fry; Dan Gustafson; Daniel Small; E. Powell Miller; Elizabeth Lippitt; Jason Thompson; Ellen Ahrens; Jennifer Frushour; Lipton, Joshua; Lance Young; Mary Jane Fait; Lipton, Joshua; Stenerson, Todd M.; Hoffman, Bruce; Martin, Jack; Tangren, John; markst@michigan.gov
Subject: RE: BCBSM - Search Terms
Attachments: SearchTerms02142012.XLS

Dan and Amy,

Thank you for your comments on the spreadsheet I circulated yesterday. Attached is a revised version, which incorporates your comments to the search strings that Blue Cross has agreed to begin running. As this process is now underway, please understand that any ability to modify these searches is limited. At this point, certainly all parties have had ample time to review and comment on these search strings.

There are some additional search strings that remain subject to the parties' discussion (indicated in yellow and orange in the attached spreadsheet). Many of these Blue Cross has not agreed to run based on Blue Cross's concerns about how broad those searches are and the likelihood that they will pull significantly more documents than one should reasonably expect Blue Cross to review and produce. I will circulate by Monday a list of the remaining search strings that were requested by either Aetna or Blue Cross, with comments regarding the same.

Best,
Ashley

From: Matheson, Dan [mailto:DMatheson@gibsondunn.com]
Sent: Wednesday, February 15, 2012 8:38 AM
To: Cummings, Ashley; Amy Fitzpatrick
Cc: Dan Hedlund; Casey Fry; Dan Gustafson; Daniel Small; E. Powell Miller; Elizabeth Lippitt; Jason Thompson; Ellen Ahrens; Jennifer Frushour; Lipton, Joshua; Lance Young; Mary Jane Fait; Lipton, Joshua; Stenerson, Todd M.; Hoffman, Bruce; Martin, Jack; Tangren, John; markst@michigan.gov
Subject: RE: BCBSM - Search Terms

Counsel,

Please see attached correspondence.

Regards,
Dan
Dan Matheson

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
Tel +1 202.887.3574 • Fax +1 202.530.9690
DMatheson@gibsondunn.com • www.gibsondunn.com

From: Cummings, Ashley [mailto:acummings@hunton.com]

Sent: Tuesday, February 14, 2012 5:23 PM

To: Amy Fitzpatrick

Cc: Dan Hedlund; Casey Fry; Dan Gustafson; Daniel Small; E. Powell Miller; Elizabeth Lippitt; Jason Thompson; Ellen Ahrens; Jennifer Frushour; Lipton, Joshua; Lance Young; Mary Jane Fait; Lipton, Joshua; Stenerson, Todd M.; Hoffman, Bruce; Martin, Jack; Tangren, John; markst@michigan.gov; Matheson, Dan

Subject: BCBSM - Search Terms

Dear Counsel:

Please see the attached correspondence.

Sincerely,
Ashley

<<2-14-12 letter to Amy Fitzpatrick re search strings.pdf>> <<SearchTerms02142012.XLS>>

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

Blue Cross Blue Shield of Michigan - MFN Litigation
 Negotiated Search Terms
 February 15, 2012

| | A | B | C |
|----|---|---|--|
| 1 | Proposed Search Terms | Search Terms To Be Run Beginning Week of February 13, 2012** | Notes |
| 2 | MFN-Related Search Terms | MFN-Related Search Terms | |
| 3 | ("most favored" OR "most-favored") w/3 (nation OR discount OR price OR pricing OR customer OR clause) | ("most favored" OR "most-favored") w/3 (nation* OR discount* OR price* OR pricing OR customer* OR clause*) | Added root expanders |
| 4 | MFN | MFN* OR MFD* OR MFP* OR MFC* | Added root expanders. Combined lines 4-7. |
| 5 | MFD | | LEFT BLANK INTENTIONALLY |
| 6 | MFP | | LEFT BLANK INTENTIONALLY |
| 7 | MFC | | LEFT BLANK INTENTIONALLY |
| 8 | "favored pricing" | "favored pricing" OR "favorable pricing" | Combined lines 8-9. |
| 9 | "favorable pricing" | | LEFT BLANK INTENTIONALLY |
| 10 | favorab* w/5 (rate OR price OR discount OR pricing) | favorab* w/5 (rate* OR price* OR discount* OR pricing) | Added root expanders |
| 11 | favored w/2 (discount OR nation OR price OR rate OR provider OR insurer OR hospital) | favored w/2 (discount* OR nation* OR price* OR rate* OR provider* OR insurer* OR hospital*) | Added root expanders |
| 12 | parity w/10 (nation OR discount OR price OR pricing OR favored OR rate) | parity w/10 (nation* OR discount* OR price* OR pricing* OR favored OR rate*) | Added root expanders |
| 13 | differential NOT "differential diagnosis" | differential* NOT "differential diagnosis" | Added root expander |
| 14 | attest* w/10 (nation OR discount OR price OR pricing OR favored OR rate) | (attest* OR violat*) w/10 (nation* OR discount* OR price* OR pricing OR favored OR rate*) | Added root expanders. Combined lines 14-15. |
| 15 | violat* w/10 (nation OR discount OR price OR pricing OR favored OR rate) | | LEFT BLANK INTENTIONALLY |
| 16 | (price OR pricing OR discount w/3 guarantee*) | (price* OR pricing OR discount*) w/3 (discount* OR guarantee*) | Modified to reflect comment from Aetna Feb. 8 and DOJ Feb. 15. Added root expanders. |
| 17 | "hold harmless" w/5 (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association") OR PHA OR "participating hospital agreement" OR "peer group" OR PG5) | (discount* OR "hold harmless") w/5 (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association") OR PHA OR "participat* hospital agreement" OR "peer group" OR PG5*) | Added root expanders, including expander on participat* requested by Aetna Feb. 15. Added discount* requested by Aetna Feb. 15. |
| 18 | ("peer group 5" OR PG5) w/5 (hospital OR "work group" OR workgroup) | ("peer group 5" OR PG5*) w/5 (hospital* OR "work group*" OR workgroup*) | Added root expander |
| 19 | antitrust | antitrust OR anti-trust | Combined lines 19-20. |
| 20 | anti-trust | | LEFT BLANK INTENTIONALLY |
| 21 | DOJ | | See A. Cummings letter to A. Fitzpatrick Feb. 2, 2012 |
| 22 | Search Terms re: Competition or Other Health Insurers | Search Terms re: Competition or Other Health Insurers | |
| 23 | market w/5 (share OR strateg* OR compet* OR entry OR enter OR entrance OR exit OR penetrat* OR threat OR streng* or domina* OR Power OR group OR individ*) | market w/5 (share OR strateg* OR compet* OR entry OR enter OR entrance OR exit OR penetrat* OR threat OR streng* or domina* OR Power OR group OR individ*) | |
| 24 | | | LEFT BLANK INTENTIONALLY |
| 25 | monopol* | | See A. Cummings letter to A. Fitzpatrick Feb. 2, 2012 |
| 26 | "next best" w/2 pric* | "next best" w/2 pric* | |
| 27 | (advantage OR disadvantage) w/5 compet* | (advantage* OR disadvantage*) w/5 compet* | |
| 28 | (advantage OR disadvantage OR rating OR rate OR premium) w/5 (Priority OR United OR UH* OR Principal OR (Aetna OR Cofinity OR PPOM OR HAP or "Health Alliance Plan" OR PHP OR "Physicians Health Plan" OR "Health Plus" OR Health+ OR Humana OR Cigna OR UPHP OR McLaren OR Assurant OR Coventry OR Multiplan OR "Trinity Health Plan" OR "Upper Peninsula Health")) | (advantage OR disadvantage OR rating OR rate OR premium) w/5 (Priority* OR United* OR UH* OR Principal* OR Aetna* OR Cofinity* OR PPOM* OR HMS* OR HAP* or "Health Alliance Plan*" OR PHP* OR "Physicians Health Plan*" OR "Health Plus*" OR Health+* OR Humana* OR Cigna* OR UPHP* OR McLaren* OR Assurant* OR Coventry* OR Multiplan* OR "Trinity Health Plan*" OR "Upper Peninsula Health*") | Modified to reflect comment from Aetna, including additional comments Feb. 15. Added root expanders. Added HMS but reserve objection based on relevance. |
| 29 | (advantage OR disadvantage OR rating OR rate) w/5 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary's" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber OR "Mid Michigan" OR MidMichigan OR Midland OR Gratiot) | | |

Blue Cross Blue Shield of Michigan - MFN Litigation
 Negotiated Search Terms
 February 15, 2012

| | A | B | C |
|----|---|--|---|
| 30 | threat* w/50 streng* w/50 weak* | (threat* w/50 streng*) w/50 weak* | Modified to reflect comment from Aetna. Added root expanders. |
| 31 | compet* w/10 threat* OR aggressive* | compet* w/10 (threat* OR aggressive*) | Modified to reflect comment from Aetna. |
| 32 | ("business plan" OR "sales plan" OR "market plan" OR "strategic plan") AND (compet* OR entry OR enter* OR entrance OR exit* OR penetrat* OR threat* OR streng* or domina*) | ("business plan" OR "sales plan" OR "market" plan" OR "strategic plan") AND (compet* OR entry OR enter* OR entrance OR exit* OR penetrat* OR threat* OR streng* or domina*) | Added root expanders, including expander on maket* requested by Aetna Feb. 15. |
| 33 | Search Terms re: Hospitals and Hospital Contracting | Search Terms re: Hospitals and Hospital Contracting | |
| 34 | (LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Mid Michigan OR MidMichigan OR Midland OR Gratiot OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber) | (discount* OR LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Mid Michigan OR MidMichigan OR Midland OR Gratiot OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber) | Modified to reflect comment from Aetna to add discount*. Remains overbroad. |
| 35 | (hospital OR facility OR provider) w/5 (network OR critical OR leverage OR alternative OR preferred OR dominant OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR steer OR tier OR strateg* OR "narrow network" OR marketab*) | | |
| 36 | (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association")) w/10 (PHA OR "participating hospital agreement" OR "peer group" OR PG5 OR reimburs* OR rate* OR model OR schonfield OR Litka OR Faja OR Spence) | | |
| 37 | LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (dave@healthdave.com OR Muller OR Lanciotti OR Bjella OR Wilkerson OR Hepler OR Leach OR McGuire OR Maryland OR Taylor OR Felbinger OR Johnson OR Herrick OR Matzick OR Matzik OR Gronda OR Rodgers OR Babinski OR Susterich OR Nykamp OR Doxtader) | (discount* OR LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (dave@healthdave.com OR Muller OR Lanciotti OR Bjella OR Wilkerson OR Hepler OR Leach OR McGuire OR Maryland OR Taylor OR Felbinger OR Johnson OR Herrick OR Matzick OR Matzik OR Gronda OR Rodgers OR Babinski OR Susterich OR Nykamp OR Doxtader) | Modified to reflect comment from Aetna, including addition of discount* requested Feb. 15. Remains overbroad. |
| 38 | "regional investment" | "regional investment" | |
| 39 | region* w/3 rating | region* w/3 rating | |
| 40 | Priority NOT ("our priority" OR "the priority" OR "a priority" OR "number one priority" or #1 priority) OR "biggest priority" OR "priority one" OR "its priority" OR "her priority" OR "his priority" OR "their priority" OR "single priority" OR "top priority") | | |
| 41 | United NOT ("United States" OR "United Way" OR "united front" OR "are united" OR "United Auto" OR "stand united" OR "to be united") | | |
| 42 | UH*; Aetna; Cofinity; PPOM; HAP; "Health Alliance Plan"; PHP; Physicians Health Plan; Health Plus; Health+; HealthPlus; Humana; Cigna; UPHP; McLaren; Assurant; Coventry; Multiplan; "Trinity Health Plans"; "Upper Peninsula Health" | | Aetna has requested the following: Aetna OR PPOM OR Cofinity OR HMS. |

Blue Cross Blue Shield of Michigan - MFN Litigation
 Negotiated Search Terms
 February 15, 2012

| | A | B | C |
|----|---|--|--|
| 43 | (margin OR margins) w/5 (group OR individual OR ASC OR ASO OR stop-loss OR "stop loss" OR hospital) | (margin OR margins) w/5 (group OR individual OR ASC OR ASO OR stop-loss OR "stop loss" OR hospital*) | Added root expander |
| 44 | (margin OR margins) AND (Aetna OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) | (margin OR margins) AND (Aetna* OR PPOM* OR HMS* OR United* OR UH* OR Priority* OR Cofinity* OR PHP* or McLaren* OR HealthPlus* OR Health+* OR "Health Plus*" OR HAP* OR competit*) | Added PPOM OR HMS but reserve objection to HMS based on relevance. |
| 45 | ("medical loss ratio" OR MLR OR "benefit cost ratio" OR BCR) AND (Aetna OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) | ("medical loss ratio" OR MLR OR "benefit cost ratio" OR BCR) AND (Aetna* OR PPOM* OR HMS* OR United* OR UH* OR Priority* OR Cofinity* OR PHP* or McLaren* OR HealthPlus* OR Health+* OR "Health Plus*" OR HAP* OR competit*) | Added PPOM OR HMS but reserve objection to HMS based on relevance. Added root expanders. |
| 46 | Search Terms re: Alleged Geographic Markets | Search Terms re: Alleged Geographic Markets | |
| 47 | (hospital* OR faciliit* OR provider* OR market OR compet* OR region OR area OR threat* OR domina* OR advantag* OR network*) w/5 (Marquette OR "western and central" OR "Upper Penninsula" OR UP OR Lansing OR Alpena OR Traverse OR Thumb OR Detroit OR "Grand Rapids" OR Kalamazoo OR Flint OR Saginaw OR Midland OR Osceola OR Montcalm OR Allegan OR St. Joseph OR Gratiot) | | |
| 48 | market w/5 (defin* OR MSA OR county OR bound*) | market w/5 (defin* OR MSA OR county OR bound*) | |
| 49 | Other Search Terms | Other Search Terms | |
| 50 | (McKinsey OR Hewitt OR Milliman) AND (hospital OR facility OR facilities OR provider*) | | |
| 51 | hospital w/10 ("social mission" OR "last resort" OR OFIR OR (office w/3 financial w/3 insurance) OR "PA 350" OR "P.A. 350" OR LARA OR "Department of Licensing and Regulatory Affairs" OR "provider class plan"); ***Per DOJ: "We believe that the individuals most-likely to have these documents are Robert Kasperek and Lisa Varnier. Therefore, we ask that you add those individuals as custodians but search them using this search string only." | | |
| 52 | | discount* w/10 (hopsital* OR chargemaster* OR relative* OR competit* OR advantage* OR barrier*) | Search requested by Aetna Feb. 15; to be tested. |
| 53 | | Aetna* OR PPOM* OR Cofinity* OR HMS* | Search requested by Aetna; to be tested. |
| 54 | | | |
| 55 | | **Yellow indicates searches to which Blue Cross has objected. | |
| 56 | | Orange indicates search to be tested. | |

Exhibit 2



HUNTON & WILLIAMS LLP
600 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30308

TEL 202 • 955 • 1500
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ASHLEY CUMMINGS
DIRECT DIAL: 404 • 888 • 4223
EMAIL: acummings@hunton.com

FILE NO: 77535.000002

February 14, 2012

Via E-mail

Amy Fitzpatrick, Esq.
United States Department of Justice
Antitrust Division, Litigation I Section
Liberty Square Building
450 Fifth Street, NW
Suite 4100
Washington, DC 20530

United States v. Blue Cross Blue Shield of Michigan
E.D. Mich., Case No. 2:10-14155

Dear Amy:

In response to my February 2, 2012 letter concerning search strings, we have received comments from Aetna including syntax suggestions. We have incorporated these comments, and changes or additions are indicated in the attached spreadsheet.

In addition, Aetna's counsel posed this helpful question: "In most of the programs with which I have worked, a search for 'price' will return as a hit any word in which those five letters appear consecutively – for instance, usages such as 'prices,' 'pricey,' 'reprice,' etc. Is that the case with the searches you are running?" The answer is no, it does not; thus, we have added some root expanders as indicated in the attached spreadsheet.

Also as indicated in the attached spreadsheet, we have combined some of the searches for the sake of efficiency.

Blue Cross will commence the process of running and pulling these searches this week. To the extent any search returns an unexpected, unmanageable number of results, we reserve the right to revisit that string. There are some search strings requested by DOJ and Aetna that remain subject to negotiation, which are identified in the attached spreadsheet. We will address those issues separately.

**HUNTON &
WILLIAMS**

Amy Fitzpatrick, Esq.
February 14, 2012
Page 2

We note that all parties have had ample opportunity to comment on these search strings. We further note that Blue Cross will not re-run these search strings should counsel later decide to comment on syntax or structure; in view of the time, effort, burden and expense associated with doing so, these search strings will be run only once.

Sincerely,



Ashley Cummings

AC:bbd

cc: (via E-mail)
Mary Jane Fait, Esq.
Jennifer Frushour, Esq.
Casey A. Fry, Esq.
Daniel E. Gustafson, Esq.
Daniel C. Hedlund, Esq.
M. Elizabeth Lippitt, Esq.
Joshua Lipton, Esq.
Thomas Marks, Esq.
Dan Matheson, Esq.
E. Powell Miller, Esq.
Daniel A. Small, Esq.
Todd M. Stenerson, Esq.
John Tangren, Esq.
Jason Thompson, Esq.
Lance C. Young, Esq.

Blue Cross Blue Shield of Michigan - MFN Litigation
 Negotiated Search Terms
 February 14, 2012

| | A | B | C |
|----|---|---|---|
| 1 | Proposed Search Terms | Search Terms To Be Run Beginning Week of February 13, 2012** | Notes |
| 2 | MFN-Related Search Terms | MFN-Related Search Terms | |
| 3 | ("most favored" OR "most-favored") w/3 (nation OR discount OR price OR pricing OR customer OR clause) | ("most favored" OR "most-favored") w/3 (nation* OR discount* OR price* OR pricing OR customer* OR clause*) | Added root expanders |
| 4 | MFN | MFN* OR MFD* OR MFP* OR MFC* | Added root expanders. Combined lines 4-7. |
| 5 | MFD | | LEFT BLANK INTENTIONALLY |
| 6 | MFP | | LEFT BLANK INTENTIONALLY |
| 7 | MFC | | LEFT BLANK INTENTIONALLY |
| 8 | "favored pricing" | "favored pricing" OR "favorable pricing" | Combined lines 8-9. |
| 9 | "favorable pricing" | | LEFT BLANK INTENTIONALLY |
| 10 | favorab* w/5 (rate OR price OR discount OR pricing) | favorab* w/5 (rate* OR price* OR discount* OR pricing) | Added root expanders |
| 11 | favored w/2 (discount OR nation OR price OR rate OR provider OR insurer OR hospital) | favored w/2 (discount* OR nation* OR price* OR rate* OR provider* OR insurer* OR hospital*) | Added root expanders |
| 12 | parity w/10 (nation OR discount OR price OR pricing OR favored OR rate) | parity w/10 (nation* OR discount* OR price* OR pricing* OR favored OR rate*) | Added root expanders |
| 13 | differential NOT "differential diagnosis" | differential* NOT "differential diagnosis" | Added root expander |
| 14 | attest* w/10 (nation OR discount OR price OR pricing OR favored OR rate) | (attest* OR violat*) w/10 (nation* OR discount* OR price* OR pricing OR favored OR rate*) | Added root expanders. Combined lines 14-15. |
| 15 | violat* w/10 (nation OR discount OR price OR pricing OR favored OR rate) | | LEFT BLANK INTENTIONALLY |
| 16 | (price OR pricing OR discount w/3 guarantee*) | (price* OR pricing) w/3 (discount* OR guarantee*) | Modified to reflect comment from Aetna. Added root expanders. |
| 17 | "hold harmless" w/5 (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association") OR PHA OR "participating hospital agreement" OR "peer group" OR PG5) | "hold harmless" w/5 (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association") OR PHA OR "participating hospital agreement" OR "peer group" OR PG5*) | Added root expander |
| 18 | ("peer group 5" OR PG5) w/5 (hospital OR "work group" OR workgroup) | ("peer group 5" OR PG5*) w/5 (hospital* OR "work group*" OR workgroup*) | Added root expander |
| 19 | antitrust | antitrust OR anti-trust | Combined lines 19-20. |
| 20 | anti-trust | | LEFT BLANK INTENTIONALLY |
| 21 | DOJ | | See A. Cummings letter to A. Fitzpatrick Feb. 2, 2012 |
| 22 | Search Terms re: Competition or Other Health Insurers | Search Terms re: Competition or Other Health Insurers | |
| 23 | market w/5 (share OR strateg* OR compet* OR entry OR enter OR entrance OR exit OR penetrat* OR threat OR streng* or domina* OR Power OR group OR individ*) | market w/5 (share OR strateg* OR compet* OR entry OR enter OR entrance OR exit OR penetrat* OR threat OR streng* or domina* OR Power OR group OR individ*) | |
| 24 | | | LEFT BLANK INTENTIONALLY |
| 25 | monopol* | | See A. Cummings letter to A. Fitzpatrick Feb. 2, 2012 |
| 26 | "next best" w/2 pric* | "next best" w/2 pric* | |
| 27 | (advantage OR disadvantage) w/5 compet* | (advantage* OR disadvantage*) w/5 compet* | |
| 28 | (advantage OR disadvantage OR rating OR rate OR premium) w/5 (Priority OR United OR UH* OR Principal OR Aetna OR Cofinity OR PPOM OR HAP or "Health Alliance Plan" OR PHP OR "Physicians Health Plan" OR "Health Plus" OR Health+ OR Humana OR Cigna OR UPHP OR McLaren OR Assurant OR Coventry OR Multiplan OR "Trinity Health Plan" OR "Upper Peninsula Health") | (advantage OR disadvantage OR rating OR rate OR premium) w/5 (Priority OR United OR UH* OR Principal OR Aetna OR Cofinity OR PPOM OR HMS OR HAP or "Health Alliance Plan" OR PHP OR "Physicians Health Plan" OR "Health Plus" OR Health+ OR Humana OR Cigna OR UPHP OR McLaren OR Assurant OR Coventry OR Multiplan OR "Trinity Health Plan" OR "Upper Peninsula Health") | Modified to reflect comment from Aetna. Added root expanders. Added HMS but reserve objection based on relevance. |
| 29 | (advantage OR disadvantage OR rating OR rate) w/5 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary's" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber OR "Mid Michigan" OR MidMichigan OR Midland OR Gratiot) | | |

Blue Cross Blue Shield of Michigan - MFN Litigation
 Negotiated Search Terms
 February 14, 2012

| | A | B | C |
|----|--|---|--|
| 30 | threat* w/50 streng* w/50 weak* | (threat* w/50 streng*) w/50 weak* | Modified to reflect comment from Aetna. Added root expanders. |
| 31 | compet* w/10 threat* OR aggressive* | compet* w/10 (threat* OR aggressive*) | Modified to reflect comment from Aetna. |
| 32 | ("business plan" OR "sales plan" OR "market plan" OR "strategic plan") AND (compet* OR entry OR enter* OR entrance OR exit* OR penetrat* OR threat* OR streng* or domina*) | ("business plan*" OR "sales plan*" OR "market plan*" OR "strategic plan*") AND (compet* OR entry OR enter* OR entrance OR exit* OR penetrat* OR threat* OR streng* or domina*) | Added root expanders. |
| 33 | Search Terms re: Hospitals and Hospital Contracting | Search Terms re: Hospitals and Hospital Contracting | |
| 34 | (LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary*" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Mid Michigan OR MidMichigan OR Midland OR Gratiot OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber) | | |
| 35 | (hospital OR facility OR provider) w/5 (network OR critical OR leverage OR alternative OR preferred OR dominant OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR steer OR tier OR strateg* OR "narrow network" OR marketab*) | | |
| 36 | (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association")) w/10 (PHA OR "participating hospital agreement" OR "peer group" OR PG5 OR reimburs* OR rate* OR model OR schonfield OR Litka OR Faja OR Spence) | | |
| 37 | LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (dave@healthdave.com OR Muller OR Lanciotti OR Bjella OR Wilkerson OR Hepler OR Leach OR McGuire OR Maryland OR Taylor OR Felbinger OR Johnson OR Herrick OR Matzick OR Matzik OR Gronda OR Rodgers OR Babinski OR Susterich OR Nykamp OR Doxtader) | (LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimbur* OR "cost per case" OR CPC OR rate*) w/10 (dave@healthdave.com OR Muller OR Lanciotti OR Bjella OR Wilkerson OR Hepler OR Leach OR McGuire OR Maryland OR Taylor OR Felbinger OR Johnson OR Herrick OR Matzick OR Matzik OR Gronda OR Rodgers OR Babinski OR Susterich OR Nykamp OR Doxtader) | Modified to reflect comment from Aetna. Remains overbroad. |
| 38 | "regional investment" | "regional investment" | |
| 39 | region* w/3 rating | region* w/3 rating | |
| 40 | Priority NOT ("our priority" OR "the priority" OR "a priority" OR "number one priority" or #1 priority) OR "biggest priority" OR "priority one" OR "its priority" OR "her priority" OR "his priority" OR "their priority" OR "single priority" OR "top priority") | | |
| 41 | United NOT ("United States" OR "United Way" OR "united front" OR "are united" OR "United Auto" OR "stand united" OR "to be united") | | |
| 42 | UH*; Aetna; Cofinity; PPOM; HAP; "Health Alliance Plan"; PHP; Physicians Health Plan; Health Plus; Health+; HealthPlus; Humana; Cigna; UPHP; McLaren; Assurant; Coventry; Multiplan; "Trinity Health Plans"; "Upper Peninsula Health" | | Aetna has requested the following: Aetna OR PPOM OR Cofinity OR HMS. |

**Blue Cross Blue Shield of Michigan - MFN Litigation
Negotiated Search Terms
February 14, 2012**

| | A | B | C |
|----|---|--|--|
| 43 | (margin OR margins) w/5 (group OR individual OR ASC OR ASO OR stop-loss OR "stop loss" OR hospital) | (margin OR margins) w/5 (group OR individual OR ASC OR ASO OR stop-loss OR "stop loss" OR hospital*) | Added root expander |
| 44 | (margin OR margins) AND (Aetna OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) | (margin OR margins) AND (Aetna OR PPOM OR HMS OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) | Added PPOM OR HMS but reserve objection to HMS based on relevance. |
| 45 | ("medical loss ratio" OR MLR OR "benefit cost ratio" OR BCR) AND (Aetna OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) | ("medical loss ratio" OR MLR OR "benefit cost ratio" OR BCR) AND (Aetna OR PPOM OR HMS OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) | Added PPOM OR HMS but reserve objection to HMS based on relevance. |
| 46 | Search Terms re: Alleged Geographic Markets | Search Terms re: Alleged Geographic Markets | |
| 47 | (hospital* OR faciliit* OR provider* OR market OR compet* OR region OR area OR threat* OR domina* OR advantag* OR network*) w/5 (Marquette OR "western and central" OR "Upper Penninsula" OR UP OR Lansing OR Alpena OR Traverse OR Thumb OR Detroit OR "Grand Rapids" OR Kalamazoo OR Flint OR Saginaw OR Midland OR Osceola OR Montcalm OR Allegan OR St. Joseph OR Gratiot) | | |
| 48 | market w/5 (defin* OR MSA OR county OR bound*) | market w/5 (defin* OR MSA OR county OR bound*) | |
| 49 | Other Search Terms | Other Search Terms | |
| 50 | (McKinsey OR Hewitt OR Milliman) AND (hospital OR facility OR facilities OR provider*) | | |
| 51 | hospital w/10 ("social mission" OR "last resort" OR OFIR OR (office w/3 financial w/3 insurance) OR "PA 350" OR "P.A. 350" OR LARA OR "Department of Licensing and Regulatory Affairs" OR "provider class plan"); ***Per DOJ: "We believe that the individuals most-likely to have these documents are Robert Kasperek and Lisa Varnier. Therefore, we ask that you add those individuals as custodians but search them using this search string only." | | |
| 52 | | | |
| 53 | | **Yellow indicates searches to which Blue Cross has objected. | |

Exhibit 3



U.S. Department of Justice

Antitrust Division

Amy R. Fitzpatrick
Liberty Square Building
450 Fifth St, N.W., Suite 4100
Washington, DC 20530-0001
(202) 532-4553
amy.fitzpatrick@usdoj.gov

November 16, 2011

VIA EMAIL

Ashley Cummings
Hunton & Williams LLP
Bank of America Plaza, St. 4100
600 Peachtree Street, N.E.
Atlanta, Georgia 30308

Re: *Plaintiffs' Second Request for Production of Documents - Search Terms*
United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Case No. 2:10-cv-14155-DPH-MKM (E.D. Mich.)

Dear Ashley:

This is in response to your letter of November 14, 2011, which included Blue Cross's first proposal of search terms to be used in locating documents responsive to Plaintiffs' Second Request for Production of Documents served August 2, 2011.

We have compared your proposal with the initial proposal plaintiffs made on September 16, 2011, as well as the proposed amendments to that list made by plaintiffs at your request on October 28, 2011. We can agree with many of your proposed search terms and search strings. However, we believe that some important terms are missing from your list and that some of the search strings must be adjusted in order to capture documents relevant to the litigation and responsive to plaintiffs' document request.

As we discussed yesterday, we have made our changes to the search term list in column B of the Excel spreadsheet you provided. That should help both sides see where plaintiffs have made changes. The revised spreadsheet is attached. If you have any questions about the adjustments plaintiffs have made, please let me know.

Ashley Cummings, Esq.
November 16, 2011
Page 2 of 3

Plaintiffs understand that the next step will be for Blue Cross to apply these search terms to the agreed-upon custodian list¹ in Blue Cross's email database. Blue Cross will then inform plaintiffs of the results (*i.e.*, total number of documents yielded by the applied search terms) and will specifically identify any individual search terms or search strings that result in what Blue Cross believes to be "an overly broad or unduly burdensome yield." In addition, it would be particularly helpful if Blue Cross could tell us the number of documents yielded by individual custodians for those search terms, which would allow us to determine if the problem is general or custodian-specific. As long as this process proceeds in an efficient and timely manner, plaintiffs are willing to work to further narrow any individual terms or search strings that Blue Cross can demonstrate are resulting in unexpectedly large yields. However, as we explained in the call yesterday, plaintiffs do not believe it is an efficient use of time to continue to attempt to narrow the proposed search term list as long as Blue Cross is unwilling to provide us with information indicating which individual terms or search strings may be driving the volume.

Regarding the discussion during yesterday's call about the final paragraph of your November 14, 2011 letter, plaintiffs now understand that it is not Blue Cross's position that all private plaintiffs must agree to the search term and custodian lists before Blue Cross will undertake the search with respect to Plaintiffs' Second Request for Production of Documents. As we pointed out on the call, this would be improper for many reasons, including that, as you told us, there are no pending discovery requests to Blue Cross in any of the private cases, one of the private cases does not have a protective order which limits our ability to share information, the private cases involve issues not relevant to this litigation, and such a demand could have been raised any time since August 2, 2011. Plaintiffs now understand that Blue Cross is only requesting that private plaintiffs be given the opportunity for input at this time in an effort to promote efficiency. As we stated on the call, we are happy to consider the views of private plaintiffs as long as it does not lead to additional delay to our case. To that end, we have copied the private plaintiffs on this letter.

Finally, Blue Cross's statements that "[t]here is no possible way that the Department could not have anticipated that its proposal . . . would be anything but unworkable," and that the original search proposed by plaintiffs "results in over 64 million documents," are misleading. First, as plaintiffs' letter of September 16, 2011, stated, the search terms proposed in that letter were meant to give the parties a "starting point in reaching agreement on a comprehensive search term list." Despite many

¹ CID Custodians: (1) Mark Bartlett, (2) Jean Carlson, (3) Jeffrey Connolly, (4) Ken Dallafior, (5) Douglas Darland, (6) Spencer Johnson, (7) Robert Milewski, (8) David Nelson, (9) Gerry Noxon, (10) Allison Pollard, (11) Kevin Seitz, (12) Kim Sorget; Custodians Listed in Plaintiffs' Request No. 8: (13) Sue Barkell, (14) John Dunn, (15) Gary Gavin, (16) Connie Hoveland, (17) Mark Johnson, (18) Kevin Klobucar, (19) Eric Kropfreiter, (20) Kathryn Levine, (21) Daniel Loepp, (22) Kelley Monterusso Root, (23) Lynda Rossi, (24) Michael Schwartz, (25) Tom Simmer, (26) Mary Smith, (27) Martha Spenny, (28) Austin Wallace; Others: (29) Joe Hohner, (30) Tom Leyden, (31) David Share (32) Robert Kaperek (for one search string only-see spreadsheet), (33) Lisa Varnier (for one search string only-see spreadsheet).

Ashley Cummings, Esq.

November 16, 2011

Page 3 of 3

requests by plaintiffs, Blue Cross chose not to provide feedback to plaintiffs until October 21, 2011, and did not provide its own proposal until November 14, 2011. Second, the September 16th terms resulted in more than 64 million documents only because Blue Cross searched its complete email database rather than only the specific identified custodians. In addition, this result did not include the de-duplication procedures Blue Cross is intending to follow.

Please let me know if you have any questions.

Best regards,

/s/

Amy R. Fitzpatrick
Trial Attorney

cc: Elizabeth Lippitt, Esq.
Mary Jane Fait, Esq.
Daniel C. Hedlund, Esq.
Daniel A. Small, Esq.
Jason Thompson, Esq.
Lance C. Young, Esq.

United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Proposed Search Terms
November 16, 2011

| | A | B |
|----|---|---|
| 1 | Blue Cross Proposal 11/14/11 | Plaintiffs' Proposal 11/16/11 |
| 2 | MFN-Related Search Terms | MFN-Related Search Terms |
| 3 | ("most favored" OR "most-favored" w/1 nation OR discount OR price OR pricing OR customer OR nation) | ("most favored" OR "most-favored") w/3 (nation OR discount OR price OR pricing OR customer OR clause) |
| 4 | MFN | agreed |
| 5 | MFD | agreed |
| 6 | MFP | agreed |
| 7 | MFC | agreed |
| 8 | avored pricing | agreed |
| 9 | favorable pricing | agreed |
| 10 | (favorab* w/2 rate OR price OR discount OR pricing) | change to w/5; search string appears to be missing some necessary parentheses |
| 11 | (favored w/2 discount OR nation OR price OR rate OR provider OR insurer OR hospital) | agreed (except search string appears to be missing some necessary parentheses) |
| 12 | (parity w/10 nation OR discount OR price OR pricing OR favored) | parity w/10 (nation OR discount OR price OR pricing OR favored OR rate) |
| 13 | (differential w/10 nation or discount OR price OR pricing OR favored) | differential NOT "differential diagnosis" |
| 14 | (attest* w/10 nation OR discount OR price OR pricing OR favored) | attest* w/10 (nation OR discount OR price OR pricing OR favored OR rate) |
| 15 | (violat* w/10 nation OR discount OR price OR pricing OR favored) | violat* w/10 (nation OR discount OR price OR pricing OR favored OR rate) |
| 16 | (price OR pricing OR discount w/3 guarantee*) | agreed (except search string appears to be missing some necessary parentheses) |
| 17 | | "hold harmless" w/5 (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association") OR PHA OR "participating hospital agreement" OR "peer group" OR PG5) |
| 18 | | ("peer group 5" OR PG5) w/5 (hospital OR "work group" OR workgroup) |
| 19 | | antitrust |
| 20 | | anti-trust |
| 21 | | DOJ |
| 22 | Search Terms re: Competition or Other Health Insurers | Search Terms re: Competition or Other Health Insurers |
| 23 | (market w/5 share OR strateg* OR compet* OR entry OR enter OR entrance OR exit OR penetrat* OR threat OR streng* or domina*) | add OR power OR group OR individ*; search string appears to be missing some necessary parentheses |
| 24 | market power | eliminate -- if combined with above search string |
| 25 | monopol* | agreed |
| 26 | ("next best" w/2 pric*) | agreed; parentheses may not be necessary |
| 27 | (advantage OR disadvantage w/5 compet*) | agreed (except search string appears to be missing some necessary parentheses) |
| 28 | (advantage OR disadvantage OR rating OR rate OR premium w/3 "Priority Health" OR "UnitedHealthcare" OR Aetna OR Cofinity OR PPOM OR HAP or "Health Alliance Plan" OR PHP OR "Physicians Health Plan" OR "Health Plus" OR Health+ OR Humana OR Cigna OR UPHP OR McLaren OR Assurance OR Coventry OR Multiplan OR "Trinity Health Plan" OR "Upper Peninsula Health" OR "Principal Financial") | (advantage OR disadvantage OR rating OR rate OR premium) w/5 (Priority OR United OR UH* OR Principal OR (Aetna OR Cofinity OR PPOM OR HAP or "Health Alliance Plan" OR PHP OR "Physicians Health Plan" OR "Health Plus" OR Health+ OR Humana OR Cigna OR UPHP OR McLaren OR Assurant OR Coventry OR Multiplan OR "Trinity Health Plan" OR "Upper Peninsula Health") |

**United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Proposed Search Terms
November 16, 2011**

| | A | B |
|----|--|---|
| 29 | (advantage OR disadvantage OR rating OR rate w/3 Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary's" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Boronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber) | change to w/5; change Boronson to Bronson; add Mid Michigan OR MidMichigan OR Midland OR Gratiot; search string appears to be missing some necessary parentheses |
| 30 | | threat* w/50 streng* w/50 weak* |
| 31 | | compet* w/10 threat* OR aggressive* |
| 32 | | ("business plan" OR "sales plan" OR "market plan" OR "strategic plan") AND (compet* OR entry OR enter* OR entrance OR exit* OR penetrat* OR threat* OR streng* or domina*) |
| 33 | Search Terms re: Hospitals and Hospital Contracting | Search Terms re: Hospitals and Hospital Contracting |
| 34 | (LOU OR LOA or "letter of understanding" or "letter of agreement" or "side letter" w/10 Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary's" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Boronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber) | (LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimburs* OR "cost per case" OR CPC OR rate*) w/10 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary*" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Mid Michigan OR MidMichigan OR Midland OR Gratiot OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber) |

**United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Proposed Search Terms
November 16, 2011**

| | A | B |
|----|--|---|
| 35 | (hospital OR facility OR provider w/3 network OR critical OR leverage OR alternative OR preferred OR dominant OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimburs* OR "cost per case" OR CPC) | change to w/5; add OR steer OR tier OR strateg* OR "narrow network" OR marketab* after w/5; search string appears to be missing some necessary parentheses |
| 36 | (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/ 2 "Hospital Association") w/10 (PHA OR "participating hospital agreement" OR "peer group" OR PG5)) | after w/10 add OR reimburse* OR rate* OR model OR Schonfield OR Litka OR Faja OR Spence |
| 37 | | LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimburs* OR "cost per case" OR CPC OR rate*) w/10 (dave@healthdave.com OR Muller OR Lanciotti OR Bjella OR Wilkerson OR Hepler OR Leach OR McGuire OR Maryland OR Taylor OR Felbinger OR Johnson OR Herrick OR Matzick OR Matzik OR Gronda OR Rodgers OR Babinski OR Susterich OR Nykamp OR Doxtader) |
| 38 | | "regional investment" |
| 39 | | region* w/3 rating |
| 40 | | Priority NOT ("our priority" OR "the priority" OR "a priority" OR "number one priority" OR "#1 priority" OR "biggest priority" OR "priority one" OR "its priority" OR "her priority" OR "his priority" OR "their priority" OR "single priority" OR "top priority") |
| 41 | | United NOT ("United States" OR "United Way" OR "united front" OR "are united" OR "United Auto") |
| 42 | | UH*; Aetna; Cofinity; PPOM; HAP; "Health Alliance Plan"; PHP; Physicians Health Plan; Health Plus; Health+; HealthPlus; Humana; Cigna; UPHP; McLaren; Assurant; Coventry; Multiplan; "Trinity Health Plans"; "Upper Peninsula Health" |
| 43 | | (margin OR margins) w/5 (group OR individual OR ASC OR ASO OR stop-loss OR "stop loss" OR hospital) |
| 44 | | (margin OR margins) AND (Aetna OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) |
| 45 | | ("medical loss ratio" OR MLR OR "benefit cost ratio" OR BCR) AND (Aetna OR United OR UH* OR Priority OR Cofinity OR PHP or McLaren OR HealthPlus OR Health+ OR "Health Plus" OR HAP OR competit*) |
| 46 | Search Terms re: Alleged Geographic Markets | Search Terms re: Alleged Geographic Markets |
| 47 | (market /3 Marquette OR "western and central" OR "Upper Penninsula" OR UP OR Lansing OR Alpena OR Traverse OR Thumb OR Detroit OR "Grand Rapids" OR Kalamazoo OR Flint OR Saginaw OR Midland OR Osceola OR Montcalm OR Allegan OR St. Joseph) | (hospital* OR facilit* OR provider* OR market OR compet* OR region OR area OR threat* OR domina* OR advantag* OR network*) w/5 (Marquette OR "western and central" OR "Upper Penninsula" OR UP OR Lansing OR Alpena OR Traverse OR Thumb OR Detroit OR "Grand Rapids" OR Kalamazoo OR Flint OR Saginaw OR Midland OR Osceola OR Montcalm OR Allegan OR St. Joseph OR Gratiot) |

**United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Proposed Search Terms
November 16, 2011**

| | A | B |
|----|---|--|
| 48 | | market w/5 (defin* OR MSA OR county OR bound*) |
| 49 | Other Search Terms | Other Search Terms |
| 50 | (McKinsey OR Hewitt OR Milliman w/5 study OR report w/10 hospital OR facility) | (McKinsey OR Hewitt OR Milliman) AND (hospital OR facility OR facilities OR provider*) |
| 51 | ("social mission" OR "last resort" w/10 OFIR OR "office of financial and insurance regulat*" OR "PA 350" OR "P.A. 350" OR LARA OR "Department of Licensing and Regulatory Affairs") | hospital w/10 ("social mission" OR "last resort" OR OFIR OR (office w/3 financial w/3 insurance) OR "PA 350" OR "P.A. 350" OR LARA OR "Department of Licensing and Regulatory Affairs" OR "provider class plan"); *** <i>We believe that the individuals most-likely to have these documents are Robert Kasperek and Lisa Varnier. Therefore, we ask that you add those individuals as custodians but search them using this search string only.</i> |

Exhibit 4



U.S. Department of Justice

Antitrust Division

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September 16, 2011

VIA EMAIL

Ashley Cummings
Bank of America Plaza, St. 4100
600 Peachtree Street, N.E.
Atlanta, Georgia 30308

Re: Plaintiffs' Second Request for Production of Documents - Proposed Search Terms
United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Case No. 2:10-cv-14155-DPH-MKM (E.D. Mich.)

Dear Ashley:

The purpose of this letter is to provide Blue Cross with suggested search terms for use in searching for documents responsive to Plaintiffs' Second Request for Production of Documents. We understand that Blue Cross will be using search terms to identify email and email attachments responsive to Plaintiffs' Second Request for Production of Documents. If Blue Cross intends to use search terms for any other part of its search and production, please let me know. In addition, plaintiffs understand that Blue Cross will also search all prior CID custodians using any new search terms agreed upon.

Plaintiffs view the list below as a starting point in reaching agreement on a comprehensive final search term list. As I have expressed to you on the telephone, plaintiffs believe that Blue Cross and its personnel are in the best position to identify responsive emails and to suggest meaningful search terms that may help identify responsive emails. This is because they are the most knowledgeable about the language, acronyms, and other common terms used in their business. Plaintiffs, therefore, look forward to considering additional suggestions by Blue Cross. Similarly, plaintiffs will continue to try to develop other relevant search terms.

The proposed search terms are listed below in general subject-matter groupings. Where possible, plaintiffs have suggested connectors and other limitations that may

Ashley Cummings, Esq.
September 16, 2011
Page 2 of 4

reduce the risk of over-inclusive results. We welcome additional suggestions in this regard. Plaintiffs suggest that searches be constructed so that every search term run will provide results that include all permutations of words containing that combination of letters. For example, the search term “discount” should result in finding all documents that contain derivations such as “discounts,” “discounting,” “discounted.” As another example, a search for “Seitz” should yield all documents that contain the email address “kseitz@bcbsm.com.” Also, no word or phrase should be case sensitive.

Also included in the list below are all search terms used on prior CID custodians that you identified in your September 2, 2011 letter.

MFN-related Search Terms

most favored nation; most favored discount; most favored price; most favored customer; most-favored nation; most-favored discount; most-favored price; most-favored customer; MFN; MFD; MFP; MFC; favorab*; favored; discount; differential; spread; parity; attest*; violat*; comply; complian*; pricing; antitrust; anti-trust; ATR; hold harmless; indemnif*; DOJ; justice

General Competition-related Search Terms

business plan; business strategy; sales plan; sales strategy; market share; market plan; market strategy; market objective; market study

compet*; strateg*; threat*; streng*; weak*; SWOT; domina*; monopol*; market w/5 share; advantage; disadvantage; ent* w/5 market; exit w/5 market; next w/2 best; regulat*; market w/5 power; group w/5 market; individ* w/5 market; penetrat* w/5 market; compet* w/5 aggressi*

Search Terms re: Hospitals and Hospital Contracting

LOU; LOA; letter of understanding; letter of agreement; side letter; steer; tier

hospital OR facility OR provider w/5 network; hospital OR facility OR provider w/5 critical; hospital OR facility OR provider w/5 leverage; hospital OR facility OR provider w/5 alternative; hospital OR facility OR provider w/5 preferred; hospital OR facility OR provider w/5 dominant; hospital OR facility OR provider w/5 must have; hospital OR facility OR provider w/5 significant; hospital OR facility OR provider w/5 strategic; hospital OR facility OR provider w/5 sole; hospital OR facility OR provider w/5 remote; hospital OR facility OR provider w/5 access; hospital OR facility OR provider w/5 narrow; hospital OR facility OR provider w/5 contract; hospital OR facility OR provider w/5 negotiat*;

Ashley Cummings, Esq.

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hospital OR facility OR provider w/5 depar*; hospital OR facility OR provider w/5 de-par*; hospital OR facility OR provider w/5 terminat*; hospital OR facility OR provider w/5 reimburs*; hospital OR facility OR provider w/5 cost per case; hospital OR facility OR provider w/5 CPC; hospital OR facility OR provider w/5 capacity; hospital OR facility OR provider w/5 marketab*

MHA; Michigan Hospital Association; Michigan Health w/3 Hospital Association; PHA; Model; peer group; PG5; work group; Schonfeld; Litka; Faja; Spence*

Marquette; Marquette General; MGH*; dave@healthdave.com; Muller; Alpena; AGH; ARMC; Lanciotti; Bjella; Sparrow; Wilkerson; Munson; MMC; Hepler; Leach; Ascension; St. John; Borgess; Genesys; St. Mary*; Saint Mary*; McGuire; Maryland; Taylor; Felbinger; Beaumont; Johnson; Herrick; Matzick; Matzik; Covenant; CMC; Gronda; Mid-Michigan; Mid Michigan; MidMichigan; Midland; Gratiot; Rodgers; Babinski; Metro Health; Susterich; Nykamp; Botsford; Doxtader; Dickinson; DCHS; Spectrum; Bronson

rating; rate; loss ratio; margin; premium; region; regional investment; benefit cost; profitab*; rating region Kalamazoo; rating region southwest Michigan

Search Terms re: Other Health Insurance Companies

Priority; United; UH*; Aetna; Cofinity; PPOM; HAP; Health Alliance Plan; PHP; Physicians Health Plan; Health Plus; Health+; Humana; Cigna; UPHP; McLaren; Assurant; MCare; Great West; Coventry; Grand Valley; Interplan; Multiplan; Trinity Health Plans; CareChoice*; Care Choice*; Upper Peninsula Health; Principal; [and other names of (or acronyms for) any commercial group health insurers or commercial individual health insurers known to Blue Cross].

Search Terms re: Geographic Markets Alleged

Marquette; Upper Peninsula; UP; Lansing; Alpena; Traverse; Thumb; Detroit; Grand Rapids; Kalamazoo; Flint; Saginaw; Midland; Gratiot; Osceola; Montcalm; Allegan; St. Joseph

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September 16, 2011
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Other Search Terms

social mission; last resort; OFIR; office w/3 financial w/3 insurance; PA
350; P.A. 350; LARA

McKinsey; Hewitt; Milliman

Seitz; Kevin; kseitz@bcbsm.com; Schwartz; mschwartz@bcbsm.com;
awallace@bcbsm.com; Farrah; Mark

* * *

As I expressed to you earlier this week, plaintiffs are very interested in reaching an agreement on search terms quickly so that the search for and production of responsive email and attachments can begin.

In addition, as we also discussed, I would like to set a specific time to meet and confer regarding Blue Cross's objections and responses to Plaintiffs' Second Request for Production of Documents. In particular, plaintiffs believe a separate conference focused on Plaintiffs' Document Request No. 42 (relating to data) is important. When we last spoke you indicated that you would confer with others on your team and propose a date and time for such a conference. I have not yet heard from you regarding any proposed dates.

Please let me know if you have any questions.

Best regards,

/s/

Amy R. Fitzpatrick
Trial Attorney

cc: Elizabeth Lippitt

Exhibit 5



U.S. Department of Justice

Antitrust Division

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March 12, 2012

VIA EMAIL

Ashley Cummings, Esq.
Hunton & Williams LLP
Bank of America Plaza, St. 4100
600 Peachtree Street, N.E.
Atlanta, Georgia 30308

Re: *Plaintiffs' Second Request for Production of Documents – Search Terms
United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Case No. 2:10-cv-14155-DPH-MKM (E.D. Mich.)*

Dear Ashley:

As we discussed last week, plaintiffs are proposing modifications to the search strings that remain under negotiation. We have provided our suggestions in column B to the "Search Strings Pending Negot." tab of the Excel spreadsheet you provided on February 27, 2012, and attached that to this letter.

Plaintiffs are providing these modifications in an effort to reach a final resolution of the remaining search strings. However, as I have explained previously, plaintiffs do not believe that it is appropriate for Blue Cross to refuse to run search strings solely because of a large number of potential search results. The objective of a search using search terms is to locate relevant documents, not fewer documents. The relevant metric for evaluating a search is to look at the percentage of relevant documents it yields in comparison to false positives. This can be done by examining a sample of the results from a proposed search string to determine whether there are, in fact, a large number of false positives and the reasons for them.

Understanding the reasons for any false positives would help the parties create limiting terms and other filters to substantially reduce false positives. Plaintiffs have

Ashley Cummings, Esq.

March 12, 2012

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repeatedly suggested this approach, particularly with respect to the “Priority” and “United” search strings. Plaintiffs again request, as we have done several times over the past few months, that Blue Cross provide us with information regarding which individual search terms are driving volume. This information can also be used to identify and eliminate false positives. For example, using the documents that have already been produced, plaintiffs were able to test many of the individual terms in the search strings under negotiation. By doing that, we found that the term “Health+” was returning an unexpectedly large number of results. By looking at a sample of those results, we were able to determine that there were many false positives. Plaintiffs, therefore, have proposed eliminating “Health+” from the search terms.

Because we do not have access to Blue Cross’s email database and search results, plaintiffs are limited in our ability to suggest additional modifications at this time. Therefore, to the extent that Blue Cross believes that any of the remaining search strings require additional modification, plaintiffs believe that it is incumbent on Blue Cross to demonstrate that the searches are resulting in false positives and to make concrete proposals regarding how to eliminate them. Plaintiffs remain willing to consider all reasonable proposals.

Finally, we have suggested some additional “NOT” limiting terms for the “Priority” and “United” search terms in an effort to eliminate false positives. We do ask, however, that you confirm that use of such limiting terms will not filter out relevant documents. For example, if there is an email referring to United Health that also contains the term “United States” elsewhere in the document, please confirm that the use of “NOT United States” will not exclude that document.

Please let me know if you have any questions.

Best regards,

/s/

Amy R. Fitzpatrick
Trial Attorney

cc: Elizabeth Lippitt, Esq.
Thomas Marks, Esq.
Dan Matheson, Esq.

**Blue Cross Blue Shield of Michigan - MFN Litigation
Negotiated Search Terms
February 15, 2012**

| | A | B |
|----|--|--|
| 1 | Search Strings Pending Negotiation | DOJ Proposed Changes 3/12/2012 |
| 2 | MFN-Related Search Terms | MFN-Related Search Terms |
| 3 | DOJ | DOJ* OR (justice w/2 dep*) OR USDOJ* OR "US DOJ*" OR FTC* |
| 4 | Search Terms re: Competition or Other Health Insurers | Search Terms re: Competition or Other Health Insurers |
| 5 | monopol* | no change proposed |
| 6 | (advantage OR disadvantage OR rating OR rate) w/5 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary's" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed City" OR "United Hospital" OR "Three Rivers" OR "West Shore" OR Gerber OR "Mid Michigan" OR MidMichigan OR Midland OR Gratiot) | Limit to 2006 to present; add root expanders |
| 7 | Search Terms re: Hospitals and Hospital Contracting | Search Terms re: Hospitals and Hospital Contracting |
| 8 | (discount* OR LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimburs* OR "cost per case" OR CPC OR rate*) w/10 (Allegan OR Allegiance OR Alpena OR Ascension OR Borgess OR Genesys OR Providence OR "St. John" OR "St. Joseph" OR "St. Mary*" OR Aspirus OR Keweenaw OR Ontonagon OR Baraga OR Beaumont OR Bell OR Botsford OR Bronson OR Caro OR Charlevoix OR Cheboygan OR Clinton OR "Branch County" OR Watervliet OR Covenant OR Deckerville OR Dickinson OR "Eaton Rapids" OR "Grand View" OR "Harbor Beach" OR "Hayes Green Beach" OR "Helen Newberry" OR Herrick OR "Hills & Dales" OR Huron OR Ionia OR Kalkaska OR "Mackinac Straits" OR Marlette OR Marquette OR McKenzie OR "Memorial Medical Center" OR "Mercy Health" OR "Metro Health" OR Mid-Michigan OR Mid Michigan OR MidMichigan OR Midland OR Gratiot OR Munising OR Munson OR Northstar OR "Iron County" OR Otsego OR "Paul Oliver" OR Pennock OR Portage OR Scheurer OR Schoolcraft OR Sheridan OR "South Haven" OR Sparrow OR Spectrum OR Blodgett OR Butterworth OR Kelsey OR "Reed | Split into two in an attempt to reduce false positives by making the proximity connector w/5 for some terms but maintaining the w/10 for others; add root expanders FIRST SEARCH: (agreement* OR contract* OR reimburs* OR rat* OR alternative* OR network*) w/5 (Allegan* OR Allegiance* OR Alpena* OR Ascension* OR Borgess* OR Genesys* OR Providence* OR "St. John"* OR "St. Joseph"* OR "St. Mary"* OR Aspirus* OR Keweenaw* OR Ontonagon* OR Baraga* OR Beaumont* OR Bell* OR Botsford* OR Bronson* OR Caro* OR Charlevoix* OR Cheboygan* OR Clinton* OR "Branch County"* OR Watervliet* OR Covenant* OR Deckerville* OR Dickinson* OR "Eaton Rapids"* OR "Grand View*" OR "Harbor Beach"* OR "Hayes Green Beach"* OR "Helen Newberry"* OR Herrick* OR "Hills & Dales"* OR Huron* OR Ionia* OR Kalkaska* OR "Mackinac Straits"* OR Marlette* OR Marquette* OR McKenzie* OR "Memorial Medical Center"* OR "Mercy Health"* OR "Metro Health"* OR Mid-Michigan* OR Mid Michigan* OR MidMichigan* OR Midland* OR Gratiot* OR Munising* OR Munson* OR Northstar* OR "Iron County"* OR Otsego* OR "Paul Oliver"* OR Pennock* OR Portage* OR Scheurer* OR Schoolcraft* OR Sheridan* OR "South Haven"* OR Sparrow* OR Spectrum* OR |
| 9 | (hospital OR facility OR provider) w/5 (network OR critical OR leverage OR alternative OR preferred OR dominant OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimburs* OR "cost per case" OR CPC OR steer OR tier OR strateg* OR "narrow network" OR marketab*) | Limit to 2006 to present; add root expanders |
| 10 | (MHA OR "Michigan Hospital Association" OR ("Michigan Health" w/2 "Hospital Association")) w/10 (PHA OR "participating hospital agreement" OR "peer group" OR PG5 OR reimburs* OR rate* OR model OR schonfield OR Litka OR Faja OR Spence) | Change "peer group" to "peer group five" OR "peer group 5"; add root expanders; change schonfield to schonfeld |
| 11 | (discount* OR LOU OR LOA OR "letter of understanding" OR "letter of agreement" OR "side letter" OR agreement OR network OR critical OR leverag* OR alternative OR preferred OR domina* OR "must have" OR sole OR remote OR access OR contract OR negotiat* OR depar* OR de-par* OR termina* OR reimburs* OR "cost per case" OR CPC OR rate*) w/10 (dave@healthdave.com OR Muller OR Lanciotti OR Bjella OR Wilkerson OR Hepler OR Leach OR McGuire OR Maryland OR Taylor OR Felbinger OR Johnson OR Herrick OR Matzick OR Matzik OR Gronda OR Rodgers OR Babinski OR Susterich OR Nykamp OR Duxtader) | Change "Johnson" to (Johnson w/10 Beaumont) |

**Blue Cross Blue Shield of Michigan - MFN Litigation
Negotiated Search Terms
February 15, 2012**

| | A | B |
|----|---|--|
| 12 | Priority NOT ("our priority" OR "the priority" OR "a priority" OR "number one priority" or #1 priority" OR "biggest priority" OR "priority one" OR "its priority" OR "her priority" OR "his priority" OR "their priority" OR "single priority" OR "top priority") | Limit to 2006 to present; add root expanders; add NOT "my priority" OR "highest priority" OR "this priority" |
| 13 | United NOT ("United States" OR "United Way" OR "united front" OR "are united" OR "United Auto" OR "stand united" OR "to be united") | Limit to 2006 to present; add root expanders; add NOT "United Hospital" OR "united we stand" |
| 14 | UH*; Aetna; Cofinity; PPOM; HAP; "Health Alliance Plan"; PHP; Physicians Health Plan; Health Plus; Health+; HealthPlus; Humana; Cigna; UPHP; McLaren; Assurant; Coventry; Multiplan; "Trinity Health Plans"; "Upper Peninsula Health" | Add UHC* and UHG*; add root expanders; delete UH*; delete Health+ |
| 15 | Search Terms re: Alleged Geographic Markets | Search Terms re: Alleged Geographic Markets |
| 16 | (hospital* OR facilit* OR provider* OR market OR compet* OR region OR area OR threat* OR domina* OR advantag* OR network*) w/5 (Marquette OR "western and central" OR "Upper Peninsula" OR UP OR Lansing OR Alpena OR Traverse OR Thumb OR Detroit OR "Grand Rapids" OR Kalamazoo OR Flint OR Saginaw OR Midland OR Osceola OR Montcalm OR Allegan OR St. Joseph OR Gratiot) | Delete provider*, region, area, and "western and central"; add root expanders |
| 17 | Other Search Terms | Other Search Terms |
| 18 | (McKinsey OR Hewitt OR Milliman) AND (hospital OR facility OR facilities OR provider*) | Limit to 2006 to present; delete provider*; add root expanders |
| 19 | hospital w/10 ("social mission" OR "last resort" OR OFIR OR (office w/3 financial w/3 insurance) OR "PA 350" OR "P.A. 350" OR LARA OR "Department of Licensing and Regulatory Affairs" OR "provider class plan"); ***Per DOJ: "We believe that the individuals most-likely to have these documents are Robert Kasperek and Lisa Varnier. Therefore, we ask that you add those individuals as custodians but search them using this search string only." | no change proposed |
| 20 | Searches Requested by Aetna | Searches Requested by Aetna |
| 21 | discount* w/10 (hospital* OR chargemaster* OR relative* OR competit* OR advantage* OR barrier*) | no change proposed |
| 22 | Aetna* OR PPOM* OR Cofinity* OR HMS* | no change proposed |

Exhibit 6



U.S. Department of Justice

Antitrust Division

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February 27, 2012

VIA EMAIL

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Atlanta, Georgia 30308

Re: *Plaintiffs' Second Request for Production of Documents – Search Terms
United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Case No. 2:10-cv-14155-DPH-MKM (E.D. Mich.)*

Dear Ashley:

This letter seeks to remind you that Blue Cross is overdue in providing information necessary to reaching resolution on the remaining search strings to be used to respond to Plaintiffs' Second Request for Production of Documents. It also raises some additional issues that remain unresolved.

Following agreement earlier this month on the majority of the search strings proposed, you stated that you would "circulate by [February 20, 2012] a list of the remaining search strings that were requested by either Aetna or [United States/State of Michigan] . . . with comments regarding the same." (Email from A. Cummings to D. Matheson and A. Fitzpatrick dated Feb. 15, 2012). Similarly, during our call on February 16, 2012, you stated that you would be circulating, by February 17, 2012, a list of the search strings that have not yet been agreed to and Blue Cross's comments to those proposed search strings. To date, however, we have received no further correspondence from Blue Cross on search strings.

As we have stated many times, we would like to reach a final resolution regarding search strings and remain committed to providing Blue Cross with prompt feedback and suggested modifications to search strings as soon as Blue Cross identifies specific issues, such as by identifying those search terms that are leading to what appear to be larger-than-anticipated search results.

Ashley Cummings, Esq.

February 27, 2012

Page 2 of 2

Presently, it is unclear to us what search strings even remain at issue. The chart attached to your February 15, 2012 email indicated that Blue Cross then had objections to thirteen of the search strings proposed by the United States/State of Michigan, Nos. 21, 25, 29, 34, 35, 36, 37, 40, 41, 42, 47, 50, and 51, and had not tested two additional search strings proposed by Aetna, Nos. 52 and 53. However, you have since stated in telephone conferences that search string No. 42 is the real problem for Blue Cross, and, therefore, the status of the remaining proposed search strings is unclear to us. You also said that you would be providing a proposal regarding No. 42, but we have not yet received it.

In addition, during our call on February 16, 2012, we discussed Blue Cross's recently asserted relevance objections to search strings 21 ("DOJ") and 25 ("monopol*"). As I explained during that call, the term "monopol*" can be expected to identify, among other topics, documents that may provide information on Blue Cross's market share in different markets or, when used relative to a Michigan hospital, may be relevant to or lead to the discovery of evidence relevant to geographic market definition. A search of those documents produced already by Blue Cross and by non-parties, yields several relevant documents containing the term "monopol*".

The term "DOJ" in search string No. 21 is meant to capture documents responsive to Request No. 10, which seeks, among other things, communications about this lawsuit or our investigation of Blue Cross. Certainly such documents would fall into the category of those reasonably calculated to lead to the discovery of admissible evidence, even if they did nothing but identify individuals at Blue Cross, or elsewhere, with knowledge of the investigation or lawsuit. Moreover, upon further reflection, we believe that additional terms should be added to the string with "DOJ" in case Blue Cross personnel used different terms when referring to the Department of Justice. Therefore, we suggest that Blue Cross add the following search terms to No. 21: "justice w/2 dep*" OR "USDOJ*" OR "US DOJ*" OR "FTC*". Finally, consistent with modifications made to other search strings, a root expander should be added to "DOJ*". In fact, as Aetna suggested regarding search strings the parties have already agreed upon, we believe it makes sense to add root expanders to all of the remaining search strings.

Please let me know when you are available to resume discussion of the remaining search strings. I am available any day this week.

Best regards,

/s/

Amy R. Fitzpatrick
Trial Attorney

cc: Elizabeth Lippitt, Esq.
Thomas Marks, Esq.
Dan Matheson, Esq.

Exhibit 7

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

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

Civil Action No. 10-cv-14155-DPH-MKM
Hon. Denise Page Hood

v.

BLUE CROSS BLUE SHIELD OF
MICHIGAN, a Michigan nonprofit
healthcare corporation,

Defendant.

**DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S
NOTICE OF SUBPOENA**

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Thomas G. McNeill (P36895)
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**BLUE CROSS AND BLUE SHIELD OF MICHIGAN'S
NOTICE OF SUBPOENA**

Pursuant to Federal Rule of Civil Procedure 45, please take notice that Defendant Blue Cross Blue Shield of Michigan intends to serve a subpoena *duces tecum*, in the form attached hereto, on United Health Group, Inc. on February 7, 2012 or as soon thereafter as service may be effectuated.

Dated: February 7, 2012

HUNTON & WILLIAMS LLP

By: /s/ Todd M. Stenerson
Todd M. Stenerson (P51953)
Attorney for Defendant
2200 Pennsylvania Ave., N.W.
Washington, D.C., 20037
(202) 955-1500

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2012, I caused the foregoing Notice of Deposition to be served via electronic mail upon:

Attorneys for the United States

Amy Fitzpatrick
U.S. Department of Justice
General
Antitrust Division
450 5th Street, N.W.
Washington, D.C. 20001
Amy.fitzpatrick@usdoj.gov

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Casey Fry: caf@millerlaw.com
Jason J. Thompson: jthompson@sommerspc.com
Lance C. Young: lyoung@sommerspc.com
Thomas Marks: markst@michigan.gov

I declare that the statements above are true to the best of my information, knowledge and belief.

HUNTON & WILLIAMS LLP

By: /s/ Todd M. Stenerson
Todd M. Stenerson (P51953)
Attorney for Defendant
2200 Pennsylvania Ave., N.W.
Washington, D.C., 20037
(202) 955-1500

February 7, 2012

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Minnesota

UNITED STATES OF AMERICA, et al.

Plaintiff

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN

Defendant

Civil Action No. 2:10-cv-14155-DPH-MKM

(If the action is pending in another district, state where: Eastern District of Michigan)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: United Health Group Incorporation, 9900 Bren Road East, Minnetonka, Minnesota 55343

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attachment A.

Place: Dickinson Wright PLLC (attn: Nicole M Wotlinski) 500 Woodward Avenue Suite 4000 Detroit, Michigan 48226-3425 Date and Time: 02/28/2012 5:00 pm

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 02/07/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Todd M. Stenerson

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party)

Blue Cross Blue Shield of Michigan, who issues or requests this subpoena, are:

Todd M. Stenerson
Hunton & Williams LLP, 2200 Pennsylvania Ave. N.W., Washinton, D.C. 20037
tstenerson@hunton.com 202-955-1500

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 2:10-cv-14155-DPH-MKM

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

EXHIBIT A

DEFINITIONS

1. The term “Actual Charge” means the amount a health care provider would bill a patient for a particular medical service or procedure if there were no participation arrangement with a health care plan.
2. The term “BCBSM” means Blue Cross and Blue Shield of Michigan, including Blue Care Network.
3. The term “Contractually Allowed Amount” means the total liability for any Actual Charges eligible for reimbursement under any Provider Agreement.
4. The term “Market Based Discount” means a pricing provision in a contract or agreement, either expressed in a written document or as part of an understanding, under which one party agrees to charge the other party a price that is determined by reference to the price charged to any other market participant.
5. The term “Member” means any person eligible for health care services under the Subscriber’s contract, including spouses, dependents, and others.
6. The term “MFN” means a pricing provision in a contract or agreement, either expressed in a written document or as part of an understanding, in which one party agrees to charge the other party a price that is as low as, or lower than, the price charged to any other party.
7. The term “PA 350” means the Nonprofit Health Care Corporation Reform Act, Mich. Comp. Laws §§ 550.1101 to 1704.
8. The term “Provider” means any person who supplies health care services, including any hospital, physician or physician group, laboratory, surgical center or nursing facility.
9. The term “Provider Agreement” means any contract, arrangement, accord or understanding either expressed in a written document or otherwise, including any amendments or modifications thereto, which sets forth rates, terms and conditions governing the payment or reimbursement of fees to a Provider for health care services.
10. The term “Subscriber” means a person who enters into a contract with You for health insurance coverage or who signs and submits an application for health insurance coverage that is accepted by You.
11. The terms “You,” “Your,” or “Yourself” means the person to whom this subpoena is addressed, including all former and present parents, subsidiaries, affiliates,

predecessors, successors, present and former officers, directors, employees, partners, agents, representatives, and other persons acting on your behalf.

INSTRUCTIONS

1. These document requests incorporate the instructions set forth in Federal Rule of Civil Procedure 45.
2. Unless otherwise indicated in a specific request, each document request below seeks documents covering the period January 1, 2003 up to the date you respond to this subpoena.
3. You need not produce for a second time a document that you produced previously in response to a CID or subpoena issued by the U.S. Department of Justice (“DOJ”) in connection with this case or in connection with the DOJ’s investigation of BCBSM’s proposed acquisition of Physicians Health Plan of Mid-Michigan, or any investigation conducted by DOJ into BCBSM’s contracting practices (including the use of a MFN or Market Based Discount), to the extent that you identify such production and the documents produced as part of that production, and BCBSM is able to verify that it has already obtained a copy of such documents.

SCHEDULE OF REQUESTED DOCUMENTS

1. Produce one copy of each Provider Agreement between you and any Michigan hospital in effect at any time since January 1, 2003, including any agreement relating to a rental network for which You made payments to a Michigan hospital.
2. For any hospital or other Provider that You believe may have a MFN or Market Based Discount with BCBSM, or with a health insurer other than BCBSM (including Yourself), produce:
 - (a) documents discussing Your basis for believing that BCBSM or such other health insurer may have a MFN or Market Based Discount provision with such hospital or other Provider;
 - (b) documents concerning Your understanding of the terms of any such MFN or Market Based Discount;
 - (c) documents that discuss the actual or potential effects of such MFN or Market Based Discount, including any effect on reimbursement rates or hospital payment methodology, or on insurance premium rates;
 - (d) documents concerning Your negotiation of a Provider Agreement with such hospital; and

- (e) documents discussing Your contracting with such hospital, including any communications concerning an increase in reimbursement rates.

3. For each Michigan hospital with which You have contracted or to which You made payments for medical care services:

- (a) documents sufficient to show the basis on which charges for such services are calculated and the type of reimbursement rate You agreed to pay (*e.g.* percentage discount off of charges, per diem, fixed dollar amount per procedure, admission or discharge, etc.);
- (b) separately for each such hospital and for each year, documents showing the total billed charges by each Michigan hospital, the contractual discount amount for such charges, and the total amount actually paid by You for such charges;
- (c) reports or other documents discussing or analyzing differences between total billed charges, contractual discount amounts, and actual dollar amounts paid;
- (d) reports or other documents discussing, comparing or analyzing any changes, and the reasons for such changes, in the reimbursement type, or total billed and paid charges information requested in subparts (a) and (b) of this request; and
- (e) reports or other documents discussing, comparing or analyzing lag times or systematic delays in payment provided to hospitals and other service Providers for medical services rendered.

4. To the extent You sought to include a MFN or Market Based Discount clause into any Provider Agreement between You and any Michigan hospital or Provider, produce all documents discussing the inclusion of such clause in the Provider Agreement, and all documents reflecting Your communications or negotiations with the Provider about the MFN or Market Based Discount clause.

5. Documents that discuss Your decision to terminate, or not enter into, a Provider Agreement with any Michigan hospital, including documents discussing the reasons for Your decision, and the effect of such decision.

6. Documents sufficient to show all Michigan hospitals with which You have entered into, or attempted to enter into, a new Provider Agreement since January 1, 2007, where immediately prior to attempting to or entering into such agreement You had no such agreement with that hospital, and all documents showing your reasons for attempting to or entering into such agreement.

7. Documents that discuss the inclusion or exclusion of any Michigan hospital from any Provider or rental network you use to serve Your Subscribers or Members, including the reasons for including or excluding such hospitals from such network, any barrier or difficulty to including such hospital, and the effect of such inclusion or exclusion on Your ability to compete for the sale of any health insurance product.

8. Documents discussing attempts to encourage or discourage the use of any Michigan hospital through the design of any health benefit plan, including features such as benefit and premium levels, differences in Providers included or excluded from the plan, or cost-sharing features such as deductibles, co-payments or co-insurance.

9. Documents sufficient to identify:

- (a) each type of health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.) You offer to customers, and
- (b) within each such product area, each separately designed health benefit plan You offer to customers, including but not limited to plans for small or large employers, or for groups or individuals.

10. Documents discussing competition between or among any health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.) or between benefit plans, including documents discussing the reasons (financial or otherwise) that customers choose one type of product or plan over another and any switching by customers or beneficiaries between such products or plans.

11. Documents sufficient to identify any health benefit plan You offer to customers on a self-insured or self-funded basis, and documents discussing competition between any such self insured or funded plans and any other type of health insurance product.

12. Documents sufficient to show how You compete for the sale of any health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.), including strategic, marketing, or business plans discussing the sale of health insurance as well as documents discussing (a) pricing strategies for the sale of such products; (b) differences in provider networks or provider reimbursement rates; or (c) differences in premium rates.

13. Documents sufficient to show your strategy for selling health insurance to various customer segments (*e.g.*, individual, small, medium or large group, national customers and ASO), including (a) strategic, marketing, or business plans; (b) documents analyzing your competitors in each customer segment; and (c) documents showing your organizational structure targeted to selling to different customer segments (including any documents discussing the reasons for such organizational structure).

14. Documents sufficient to show how You compete for the sale of any health benefit plan You offer to customers on a self-insured or self-funded basis, including documents

discussing pricing strategies for the sale of such products, and documents discussing the sale of stop loss coverage to such customers.

15. Documents sufficient to show each geographic area within Michigan in which You offer any health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.) for sale to customers, including documents sufficient to identify any geographic areas within Michigan in which You do not sell such health insurance products.

16. Documents discussing any geographic area within Michigan in which You either ceased or limited the sale of a health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.), or any geographic area within Michigan in which You currently plan to, or have previously planned to, begin selling such health insurance product for which such plans have been either delayed or terminated, and the reasons for such cessation or limitation or change in plans.

17. For any geographic area within Michigan in which You do not sell a health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.), that You sell or offer to customers in at least some parts of Michigan, documents sufficient to show the reasons that You do not sell such products in those areas, including any barrier or difficulty regarding Your ability to sell such products in those areas.

18. Documents discussing your plans to expand or change the number or type of health insurance products (*e.g.* HMO, PPO, traditional indemnity plan, etc.), or health benefit plans you offer to Michigan customers, including any plans to expand or change the geographic area in which you offer such products or benefit plans, or any plans to expand or change the customer segments (*e.g.*, individual, small, medium or large group, national customers and ASO) in which You compete, and any factors which you believe affects your plans to expand or change such product offerings.

19. Documents concerning the acquisition of any health insurer, HMO, or health plan serving Michigan residents, including documents discussing the actual or potential effect of such acquisition on competition for health insurance in Michigan.

20. Documents discussing the effect on reimbursement rates or competition for the sale of health insurance in Michigan of any ownership relationship or interest that any health care provider has in any health insurer or health benefits plan provider, including, for example, the ownership of a HMO by any hospital.

21. Documents discussing competition between You and BCBSM, including factors such as:

- (a) BCBSM's status as an insurer of last resort;
- (b) differences in regulation between You and BCBSM (including BCBSM's regulation pursuant to PA 350 or differences in regulations concerning

covered services such as limitations on pre-existing conditions exclusions); and

- (c) differences in the premium rates You charge for any health insurance product due to any of these factors, and any competitive advantages or disadvantages caused by such factors.

22. Documents showing Your market share (or the market share of any of Your competitors) for any health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.) for any market that includes any part of Michigan, including shares for any customer or market segment (*e.g.*, individual, small, medium or large group, national customers and ASO).

23. Documents sufficient to show the process by which You establish the rates charged to Your customers for each health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.) or health benefit plan sold to customers located in Michigan and the factors that affect how You determine those rates, and whether changes in premiums or rates for one type of health insurance product affect the rates for other health insurance products.

24. Documents sufficient to show the data compilations you use for reporting and analysis of premium revenue, premium rates, discounts, claims, billing, and enrollment along with documents sufficient to understand and analyze such data compilations including data dictionaries and a description of all tables, fields, and data types contained in such data compilations.

25. For each health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.), or health benefit plan You sold to customers in Michigan for any year from January 1, 2003 to the present, documents or data, showing:

- (a) the total amount of premiums earned,
- (b) the number of Your Subscribers, Members, or covered lives,
- (c) the amount of losses or benefits paid, including Your medical loss ratio;
- (d) Your costs for hospital and physician services, prescriptions, home health services and medical equipment;
- (e) Your operating or other margins for each such product; and
- (f) Your largest customers for each product or plan and their location.

26. Documents discussing or analyzing changes in the rates charged for any health insurance product (*e.g.* HMO, PPO, traditional indemnity plan, etc.), or health benefit plan offered to customers in Michigan, including any analysis of the reasons for any changes or increases in such rates.

27. Documents sufficient to show:
- (a) the amount of money You contributed to any hospital in Michigan that was intended to reimburse such hospital for providing uncompensated care to persons without health insurance;
 - (b) the amount of money You contributed to Michigan health care clinics that provide free health care to uninsured persons;
 - (c) the amount of money You contribute to Michigan organizations to support health care research.
 - (d) the amount of money that You contributed to the MICHild Program and any other similar programs;
 - (e) the amount of money that You contributed to cover Medicare/Medicaid shortfalls at each hospital; and
 - (f) the amount of money that You invested in cost and quality incentive programs to any Michigan hospital.

28. Documents reflecting or discussing communications You have had with the U.S. Department of Justice (“DOJ”) concerning any DOJ investigation of BCBSM’s use of a MFN or Market Based Discount, including any documents provided to the DOJ and documents discussing any meetings or telephone calls You had with DOJ.

29. All documents concerning any claim You made to DOJ that a MFN or Market Based Discount clause in any Provider Agreement with BCBSM affected Your reimbursement rate or hospital payment methodology, including documents showing the rate or payment methodology before and after the MFN or Market Based Discount had such affect, the number of Your Subscribers or Members affected by any change, and the total dollar amount of medical claims You paid to such hospital before and after such affect.

30. For any such hospital referred to in the prior request, all documents concerning the importance to You in having a Provider Agreement with such hospital, the effects of departicipation with such hospital (including any alternatives to providing care for Your Subscribers or Members) and any communications with customers concerning the necessity of You having a Provider Agreement in effect with such hospital.

31. Documents discussing the impact of payment or reimbursement rates paid by government funded medical insurance programs on the financial condition of Michigan hospitals or on reimbursement rates paid by commercial insurers, including any documents discussing the efforts of Michigan hospitals to offset any funding shortfall from government programs by increasing reimbursement rates paid by commercial insurers.

32. Medical claims data showing the following, for each year from January 1, 2003, to the present, for each inpatient discharge or outpatient encounter for all Your Michigan Subscribers or Members (regardless of hospital location) or at any hospital in Michigan (regardless of the Subscriber's or Member's residence), including claims processed or re-priced for other payors:

- (a) A record type indicator showing whether it was an inpatient discharge or an outpatient encounter;
- (b) The name of the hospital at which the patient was treated;
- (c) Any unique hospital identifiers, including the Center for Medicare Services Certification Number (CCN), or National Provider Identifier (NPI), and Sub-part National Provider Identifier, if applicable;
- (d) The Member and Subscriber ID of the patient;
- (e) The group and subgroup ID fields, including the name of the group or subgroup and any unique alphanumeric identifiers for the group and subgroup;
- (f) The name of the health plan;
- (g) The type of health plan;
- (h) Any indicator showing whether the Subscriber or Member was covered under a plan sold in another state;
- (i) The Member's and Subscriber's city, county and state and zip code;
- (j) The patient's length of stay including the episode start and end dates;
- (k) The admission type and point of origin for admission or visit;
- (l) The patient discharge status;
- (m) Any indicator of whether You are the principal payor for the episode of care, or whether another payor is responsible, including the identity of any other payor;
- (n) Any indicator of whether You are re-pricing the claim for another company or acting as a rental network;
- (o) Identifying information for the admitting, referring and attending physicians (including any surgeon), including the National Provider

- Identifier (NPI) for each such physician, and information stating whether each such physician participates with the Member's health plan;
- (p) The Major Diagnostic Category using the CMS major diagnostic category code associated with the principal diagnosis;
 - (q) The DRG using the DRG code associated with the primary diagnosis and primary procedure. If multiple DRGs are recorded, include all DRGs separately and indicate which DRG is relevant for billing purposes. (If You use a coding system other than MS-DRG indicate the type of DRG system used and provide a table mapping each DRG to a MS-DRG code.)
 - (r) Any DRG weighted measure, *e.g.*, based on the amount of resources consumed, that you track for each DRG, provided separately for each DRG for which data is provided;
 - (s) The principal ICD diagnosis code based on the condition chiefly responsible for occasioning the admission of the patient for care. (If You use a coding system other than ICD-9-CM, indicate the type of ICD-9 system used and provide a table mapping each ICD-9 to ICD-9-CM codes.)
 - (t) Other or secondary ICD diagnosis codes based on conditions that coexist at the time of admission or develop during the admission that affect the treatment received and/or length of stay;
 - (u) The principal and secondary ICD procedure codes identifying medical procedures performed;
 - (v) For each facility charge, professional fee, drug charge, equipment fee, ancillary or specialty charges, provide the following information, stated separately for each such charge or fee and separately for each primary or secondary payor: (i) the total Actual Charge; (ii) the amount of the Actual Charge eligible for reimbursement; (iii) the Contractually Allowed Amount; (iv) the total amount owed (by both You and the Subscriber or Member); (v) the health plan liability amount; (vi) the Subscriber's or Member's liability for co-pays, co-insurance, deductibles or balance billing; and (vii) the Subscriber's or Member's liability for any non-covered service; and
 - (w) The basis of payment for each claim (*e.g.* percent of charge, per diem, case rate, etc.) and the actual amount paid by You for such claim.

33. Data showing the following information with respect to Your Subscriber and Member enrollment history, for each year beginning on January 1, 2003, until the present, for each of Your Michigan Subscribers and Members, any other Subscriber or Member who

received hospital care in Michigan, and any of Your Subscribers or Members identified in the data produced in response to Request No. 32:

- (a) The Member and Subscriber ID of the patient;
- (b) Group and sub-group ID fields, including the name of the group or sub-group and any alphanumeric identifier for the group or sub-group;
- (c) Any benefit plan identifying information, such as plan name and ID number;
- (d) The dates of coverage for each Subscriber or Member, including the date that coverage under any certificate of coverage became effective or ended;
- (e) The Subscriber's or Member's city, county and state and zip code;
- (f) The Member's age, gender, and relationship to the Subscriber;
- (g) Any benefit plan identifier that corresponds to a unique set of benefits;
- (h) Information about each Subscriber's contract description, such as "subscriber only," "subscriber plus dependent," "family," "subscriber plus spouse," "subscriber plus other," or "retiree," and;
- (i) Any indicator that coverage is being provided under COBRA.

34. Data showing the following information with respect to each group, sub-group or unique health benefits plan, and for any Subscriber or Member within each such group, sub-group, or benefits plan, related to any of Your Subscribers or Members identified in the data produced in response to Request Nos. 32 or 33:

- (a) The quarter and year of the observation;
- (b) Group and sub-group ID fields, including the name of the group or sub-group and any alphanumeric identifier for the group or sub-group;
- (c) Any benefit plan identifier that corresponds to a unique set of benefits;
- (d) Beginning and end dates of the master policy for the group or subgroup at the time of the observation;
- (e) Group and/or subgroup size and category (*e.g.*, individual, small, medium or large group, national customers or ASO);

- (f) Total number of Member and Subscriber-months for each group and sub-group, stated separately for all Members and Subscribers and for all Michigan Members and Subscribers;
- (g) The physical address (separate from any billing address) of each group and sub-group, including street address, city, state, county and zip code;
- (h) The billing address of each group and sub-group including street address, city, state, county and zip code;
- (i) Information about the geographic segmentation of any group or sub-group, including information about the rating region for each group and sub-group;
- (j) Any industry or other code of the group or sub-group used by You for the purpose of rating the price of insurance offered to such group or sub-group;
- (k) The line of business encompassed by the plan (*e.g.* HMO, PPO, POS, indemnity, etc.);
- (l) Information about whether the plan is a High Deductible Health Plan (HDHP) and whether there is an associated Health Savings Account (HSA) offered;
- (m) Information about the funding type of the plan including whether the plan is self-insured, fully insured, or any other funding category;
- (n) Information about whether the group or sub-group has purchased a stop loss plan and if so, from whom;
- (o) Information about the premiums paid by the group or sub-group including total premium, and employer and employee contributions;
- (p) Information about other premium charges or credits;
- (q) The total amount of charges for claims incurred in the specified quarter and year, including (i) the total Actual Charge; (ii) the amount of the Actual Charge eligible for reimbursement; (iii) the Contractually Allowed Amount; (iv) the total amount owed (by both You and the Subscriber or Member); (v) the health plan liability amount; (vi) the Subscriber's or Member's liability for co-pays, co-insurance, deductibles or balance billing; and (vii) the Subscriber's or Member's liability for any non-covered service;

- (r) The total amount of charges for hospital services incurred in the specified quarter and year, including (i) the total Actual Charge; (ii) the amount of the Actual Charge eligible for reimbursement; (iii) the Contractually Allowed Amount; (iv) the total amount owed (by both You and the Subscriber or Member); (v) the health plan liability amount; (vi) the Subscriber's or Member's liability for co-pays, co-insurance, deductibles or balance billing; and (vii) the Subscriber's or Member's liability for any non-covered service;
- (s) The total claims paid by You in the specified quarter and year; and
- (t) The total claims paid by You in the specified quarter and year for hospital services.

35. Data showing the following information for each health benefit plan offered by You to any Michigan Subscriber or Member or to any of Your other Subscribers or Members who received hospital care in Michigan, from January 1, 2003 to the present, including all plans offered to any of Your Subscribers or Members identified in the data produced in response to Request Nos. 32 to 34:

- (a) The benefit plan identifier that corresponds to a unique set of benefits;
- (b) The name of the plan, including any trade name used to describe the plan;
- (c) The line of business encompassed by the plan (*e.g.* HMO, PPO, POS, indemnity, etc.);
- (d) The customer segment applicable to the plan (*e.g.*, individual, small, medium or large group, national customers and ASO);
- (e) The various types and structures of benefits offered by the plan, including any variable listed in any summary of benefits and coverage document for the plan; and
- (f) Information about any provider network covered by the plan such as the number of physicians and specialists or the number of hospitals in the network.

36. Data showing the following information for any hospital identified in the data produced in response to Request Nos. 32 to 35;

- (a) Any unique identifiers of the hospital including the CMS Certification Number (CCN), National Provider Identifier (NPI), and Sub-part National Provider Identifier (if applicable);
- (b) Name and address of the hospital;

- (c) The name of the health system to which the hospital belongs, if any;
- (d) The type of health plan for which the hospital contracting information provided in these data requests is applicable, and the beginning and end dates for which the contract is effective (including any separate contract applicable to individual hospitals or group of hospitals within any system);
- (e) Health plan benefit package identifiers for which the hospital contracting information provided is applicable;
- (f) Information on whether the hospital was a participating provider in any of Your health plans, and if so, the identity of such plan and any information about any applicable network tier;
- (g) Information identifying the contractual reimbursement method between the health plan and the hospital (e.g., per diem, other capitation payment, DRG-based, or percent of charges),
- (h) Information about the rate of payment applicable to each payment method, (e.g. per diem or capitation amount or percentage amount); and
- (i) The hospital's Cost Per Case Amount for each calendar year of the contract.

37. Financial statements (such as income statements or profit and loss statements) showing Your revenues, costs, and operating margins for each type of health insurance product (e.g. HMO, PPO, traditional indemnity plan, etc.) sold to Michigan subscribers, and for each customer segment (e.g., individual, small, medium or large group, national customers and ASO) for which You have Michigan Subscribers. Such financial statements should be provided for the shortest time interval available (e.g. month, quarter, annual) and at the most disaggregated level, including for the smallest geographic segments within Michigan, that such information is maintained in the normal course of business.

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

UNITED STATES OF AMERICA and the
STATE OF MICHIGAN,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF
MICHIGAN,

Defendant.

Civil Action No. 2:10cv14155-DPH-MKM
Judge Denise Page Hood
Magistrate Judge Mona K. Majzoub

STIPULATED PROTECTIVE ORDER CONCERNING CONFIDENTIALITY

In the interests of (i) promoting an efficient and prompt resolution of this action;
(ii) facilitating discovery by the Parties litigating this action; and (iii) protecting the Parties' and
non-parties' Confidential Information from improper disclosure or use, Plaintiffs United States
of America and State of Michigan, and Defendant Blue Cross Blue Shield of Michigan
(collectively, the "Parties"), have stipulated to the provisions set forth below. Upon good cause
shown, pursuant to Fed. R. Civ. P. 26(c)(1)(G) and E.D. Mich. LR 26.4, the Court ORDERS as
follows:

A. DEFINITIONS

1. As used in this Order:

(a) "Confidential Information" means any trade secret or other confidential
research, development, or commercial information, as such terms are used in Fed. R. Civ. P.
26(c)(1)(G), or any document, transcript, or other material containing such information.

(b) “Defendant” means Blue Cross Blue Shield of Michigan, its divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

(c) “Disclosed” means shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part.

(d) “Document” means documents or electronically stored information as defined in Fed. R. Civ. P. 34(a).

(e) “Investigations” means the Department of Justice’s and/or the State of Michigan’s pre-Complaint inquiries into (i) Defendant’s inclusion of “most favored nation” clauses in its contracts with hospitals in Michigan; and/or (ii) Defendant’s proposed acquisition of Physicians Health Plan of Mid-Michigan.

(f) “Investigation Materials” means documents, transcripts of testimony, or other materials that (i) any non-party provided to any Party either voluntarily or under compulsory process during the Investigations; (ii) any Party sent to any non-party during the Investigations; and/or (iii) Defendant has provided to either Plaintiff during the Investigations.

(g) “Person” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or trust.

(h) “Plaintiffs” means the United States of America and the State of Michigan, the Antitrust Division of the Department of Justice, the Michigan Attorney General’s Office, and all employees, agents, and representatives of the Antitrust Division of the Department of Justice and the Michigan Attorney General’s Office.

(i) “Protected Person” means any person (including a Party) that has provided Investigation Materials or that, voluntarily or under compulsory process, provides any documents or testimony in this action.

(j) “This Action” means the above-captioned action pending in this Court, including any pretrial, trial, post-trial, or appellate proceedings.

B. DESIGNATION OF CONFIDENTIAL INFORMATION

2. Within three business days after the Court’s entry of this Order, each Plaintiff shall send by email, facsimile, or overnight delivery a copy of this Order to each non-party Protected Person (or, if represented by counsel, the Protected Person’s counsel) that provided Investigation Materials to that Plaintiff.

3. A Protected Person may designate as “Confidential Information” any Investigation Materials that it has provided to a Party during the Investigations, or any documents or transcripts of testimony that it provides to any Party during this action, to the extent such information constitutes Confidential Information as defined in Paragraph 1(a) of this Order. Such designations constitute a representation to the Court that such Protected Person believes, in good faith, that the information so designated constitutes Confidential Information. Any production of documents or testimony not designated as Confidential Information will not be deemed a waiver of any future claim of confidentiality concerning such information if it is later designated Confidential Information pursuant to Paragraph 6 of this Order. However, any such subsequent designation will not retroactively prohibit the disclosure of any information for which disclosure was proper when made.

4. Investigation Materials provided to a Party during the Investigations, or any documents or transcripts of testimony provided to a Party during the Investigations that was

previously designated “confidential” shall continue to be treated as Confidential Information and need not be re-designated as confidential pursuant to this paragraph.

5. Designation as Confidential Information of Investigation Materials and materials produced during this action prior to entry of this Order is governed as follows:

(a) All transcripts of depositions taken by either Plaintiff during the Investigations or during this action prior to entry of this Order will be treated as Confidential Information in their entirety for 30 days after entry of this Order. At any time during the 30-day period, each Protected Person may designate as Confidential Information, in compliance with paragraph 3 of this Order, any portion of the transcript, by page and line, and any accompanying exhibits produced by the Protected Person. Within seven days following the 30-day period, Plaintiffs shall transmit to Defendant all deposition confidentiality designations received from non-parties.

(b) All documents provided to either Plaintiff during the Investigations or during this action prior to entry of this Order will be treated as Confidential Information in their entirety for 60 days after entry of this Order. At any time during the 60-day period, any Protected Person may designate as Confidential Information, in compliance with paragraph 3 of this Order, any document or portion of a document produced to either Plaintiff as Confidential Information by providing Plaintiffs with document-production page numbers or other means of easily identifying the designated documents. Within seven days following the 60-day period, Plaintiffs shall transmit to Defendant all confidentiality designations received from non-parties.

6. Designation as Confidential Information of deposition transcripts and documents produced during this action after entry of this Order is governed as follows:

(a) Whenever discovery is sought by subpoena from a non-party in this action after entry of this Order, a copy of this Order shall accompany the subpoena.

(b) All transcripts of depositions taken in this action after entry of this Order will be treated as Confidential Information in their entirety for 30 days after the date a copy of the final transcript has been made available to the Protected Person for review. Within five days of receipt of the final transcript, the Party that noticed the deposition shall provide the final transcript to the Protected Person. At any time during the 30 days following receipt of the final transcript, the Protected Person may designate testimony as Confidential Information, in compliance with paragraph 3 of this Order. Such designations (with reference to the page(s) and line(s) of the final transcript) must be provided in writing by the person making such designations to Plaintiffs' and Defendant's counsel.

(c) A Protected Person that designates as Confidential Information any document produced in this action after entry of this Order must stamp or label each confidential page of each document with the designation "CONFIDENTIAL." If the entire document is not Confidential Information, the Protected Person shall stamp or label only those pages that contain Confidential Information. Where Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Confidential Information, the "CONFIDENTIAL" designation may be placed on the disk.

7. If a Party or Protected Person inadvertently fails to designate as Confidential Information any documents or testimony, it may later so designate by notifying the Parties in writing. After receiving such notice, the Parties shall thereafter treat the newly designated information as Confidential Information. No prior disclosure of newly designated Confidential

Information shall violate this Order and the Parties have no obligations regarding such prior disclosures, if any.

8. Any Party that objects to the designation as Confidential Information of any documents or transcripts may notify the designating person in writing, copying all Parties. The designating person shall then have 14 days from receipt of the notification to file a motion seeking a Court order upholding the designation. The burden of proving that the designation is proper under Rule 26(c)(1)(G) shall be upon the person seeking to uphold the designation. If a motion is filed, the Parties shall continue to treat the designated Confidential Information at issue as Confidential Information until the Court rules on the motion. If the designating person does not seek an order within two weeks of receiving notice, or if the Court determines the designation of Confidential Information to have been inappropriate, the challenged designation shall be rescinded.

9. If a Party receives a confidentiality waiver to allow a deponent to be questioned on information that would otherwise be Confidential Information, that waiver (including identifying the specific Confidential Information to which it pertains) must be disclosed to counsel for all other Parties as soon as practicable, but in any event no later than five business days prior to the deposition of the witness in question.

C. SCOPE OF DISCLOSURE OF CONFIDENTIAL INFORMATION

10. Except as authorized by this Order, documents, transcripts of testimony, or other materials designated as Confidential Information pursuant to this Order shall not be disclosed to any person other than the persons set forth below, and may be disclosed to and used by the persons set forth below only in this action:

- (a) the Court and all persons assisting the Court in this action, including law clerks, court reporters, and stenographic or clerical personnel;
- (b) United States Department of Justice attorneys and employees, and independent contractors retained by the United States Department of Justice to assist in the prosecution of this litigation or otherwise assist in its work;
- (c) Michigan Attorney General's Office attorneys and employees, and independent contractors retained by the Michigan Attorney General's Office to assist in the prosecution of this litigation or otherwise assist in its work;
- (d) outside counsel acting for Defendant in this action, that counsel's employees, and independent contractors assisting such outside counsel in the defense of this action;
- (e) authors, addressees, and recipients of particular information designated as Confidential Information solely to the extent that they have previously had lawful access to the particular information disclosed or to be disclosed;
- (f) persons (and their counsel) whom Plaintiffs or Defendant believes, in good faith, to have had prior access to the Confidential Information, or who have been participants in a communication that is the subject of the Confidential Information and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they may have had access or that is the subject of the communication in which they may have participated; provided that, unless and until the persons or their counsel confirms that the persons had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the persons' access or participation; and

(g) testifying or consulting experts retained by a Party to assist outside counsel in the prosecution or defense of this action, including employees of the firm with which the expert or consultant is associated to the extent necessary to assist the expert's work in this action.

11. Before any information designated as Confidential Information may be disclosed to any person described in paragraph 10 of this Order, he or she must first read this Order or must have otherwise been instructed on his or her obligations under the Order by this Court or counsel for a Party, and shall have executed the agreement included as Appendix A hereto. Counsel for the Party making the disclosure must retain the original of such executed agreement for a period of at least one year following the final resolution of this action. Each individual described in paragraph 10 of this Order to whom information designated as Confidential Information is disclosed must not disclose that Confidential Information to any other individual, except as provided in this Order.

12. Notwithstanding paragraphs 8 and 9 of this Order, nothing in this Order:

- (a) limits a person's use or disclosure of its own information designated as Confidential Information;
- (b) prevents disclosure of Confidential Information by any Party to any current employee of the person that designated the information as Confidential Information; or
- (c) prevents disclosure of Confidential Information by any Party with the consent of the person that designated the Confidential Information.
- (d) prevents the United States or the State of Michigan, subject to taking appropriate steps to preserve the further confidentiality of such information, from disclosing information designated as Confidential Information (i) to duly authorized representatives of the

Executive Branch of the United States Government or of the State of Michigan; (ii) in the course of any other legal proceedings in which the United States or the State of Michigan is a party; (iii) to secure compliance with a Final Judgment that is entered in this action; (iv) for law enforcement purposes, or (v) as may be required by law.

(e) prohibits the discussion of issues with witnesses simply because those issues are discussed in confidential information, provided that the witness in question had lawful access to the particular information being discussed.

D. DISCLOSURE OF CONFIDENTIAL INFORMATION IN PRETRIAL PROCEEDINGS IN THIS ACTION

13. If any documents or testimony designated under this Order as Confidential Information is included in any pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file such material shall follow the procedures set forth in E.D. Mich. LR 5.3. Nothing in this Order shall restrict any person, including any member of the public, from challenging the filing of any Confidential Information material under seal.

E. PROCEDURES UPON TERMINATION OF THIS ACTION

14. Within 90 days after receiving notice of the entry of an order, judgment, or decree terminating this action, all persons having received information designated as Confidential Information must either make a good faith effort to return such material and all copies thereof to the person that produced it, or destroy all such Confidential Information and certify that fact in writing to that person. Counsel for Plaintiffs and Defendant will be entitled to retain court papers, deposition and trial transcripts and exhibits, and work product, provided that Plaintiffs' employees and Defendant's counsel and such counsel's employees do not disclose the portions of court papers, deposition transcripts, exhibits, or work product containing information

designated as Confidential Information to any person except pursuant to Court order or agreement with the person that produced the information designated as Confidential Information. All Confidential Information returned to the Parties or their counsel by the Court likewise must be disposed of in accordance with this Paragraph.

F. RIGHT TO SEEK MODIFICATION

15. Nothing in this Order prevents any person, including members of the public, from seeking modification of this Order, upon motion made pursuant to the rules of this Court.

SO ORDERED:

Dated at Detroit, Michigan, this 16th day of March, 2011.

BY THE COURT:

s/Denise Page Hood
Denise Page Hood
UNITED STATES DISTRICT JUDGE

Dated: March 16, 2011

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, March 16, 2011, by electronic and/or ordinary mail.

s/Felicia Moses for LaShawn R. Saulsberry
Case Manager, (313) 234-5165

Stipulated for form and entry by:

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Exhibit 8

Slip Copy, 2009 WL 2475581 (E.D.Mich.)
(Cite as: 2009 WL 2475581 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Irene JARVIS, Plaintiff,
v.
MICHIGAN BELL TELEPHONE CO., AT & T,
Inc., Defendants.

Civil Action No. 08-CV-12262-DT.
Aug. 11, 2009.

Charles J. Gerlach, Lebow/Gerlach, West Bloomfield, MI, Peter L. Conway, Lapeer, MI, for Plaintiff.

Laura A. Lindner, Lindner and Marsack, Milwaukee, WI, Robert C. Tice, Pilchak, Cohen, Auburn Hills, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL

MONA K. MAJZOUB, United States Magistrate Judge.

*1 This matter comes before the Court on Plaintiff's Amended Motion to Compel Discovery filed on July 3, 2009. (Docket no. 56). Defendant Michigan Bell Telephone Co.^{FN1} has filed a Response brief. (Docket no. 58). Plaintiff has filed a Reply brief. (Docket no. 61). The parties also filed a Joint Statement of Resolved/Unresolved Issues. (Docket no. 62). The motion has been referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 57). The Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(e). The motion is now ready for ruling.

^{FN1}. Defendant AT & T has been dismissed. (Docket no. 37).

1. Facts, Claims, and Procedural History

This is an employment discrimination action. The parties' Joint Statement discusses seven issues that require court intervention to resolve. (Docket no. 62). The Court will address these issues in the order presented in the Joint Statement. Discovery closed in this action on June 30, 2009. (Docket no. 50). A settlement conference is scheduled for August 26, 2009 before Judge Roberts.

Judge Roberts has dealt with previous discovery issues. On February 23, 2009 the Court entered an Order resolving a Motion for Order to Show Cause filed by Defendant Michigan Bell Telephone Co. in connection with Plaintiff's failure to provide discovery as ordered by the court on December 18, 2008. (Docket no. 40). The court found in that Order that "Plaintiff has unreasonably delayed the proceedings" and that "Plaintiff's failure to provide documents, and to comply with this Court's December 18, 2008 Order [was] wilful and in bad faith." (*Id.* at 2). Defendant was allowed to file a bill of costs for expenses incurred in connection with the filing of that motion. On May 19, 2009 the court granted Defendant's First and Second Petition for Fees and ordered Plaintiff and her attorneys to pay \$3,650.00 as a sanction. (Docket no. 53). In addition, on April 21, 2009 the court extended the discovery deadline (to June 30, 2009) and noted that there would be no further extensions of that date. (Docket no. 50). In that same Order the court limited Plaintiff to taking five depositions. (*Id.*). Plaintiff now seeks the Court's assistance in compelling Defendant to supplement its discovery responses, in allowing Plaintiff to conduct three more depositions, and in extending the discovery deadline. (Docket no. 56).

2. Analysis

A. Deposition of Dr. Keelin

Dr. Keelin is a retired psychologist who previously treated Plaintiff. Defendant wishes to take his deposition. On April 21, 2009 the Court ordered

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Plaintiff to “immediately provide a ‘hold harmless’ agreement to Dr. Keelin to facilitate his deposition.” (Docket no. 50 at 1). However, Dr. Keelin refused to be deposed until he had a malpractice policy in place. Defendant was advised on June 29, 2009 that Dr. Keelin had received his policy and that it was effective starting July 1, 2009, one day after the close of discovery. (Docket no. 58 attachment 5). Plaintiff in her Response brief states that she “has never made the taking of Dr. Keelin's deposition after June 30, 2009, conditional on defendant conceding to plaintiff's discovery needs,” and agrees that his deposition should be taken. (Docket no. 61 at 6). Dr. Keelin's deposition therefore should proceed even though the discovery deadline has now passed. This Court rejects Defendant's suggestion to prohibit Plaintiff from offering testimony from Dr. Keelin. **Dr. Keelin's deposition must be completed on or before September 10, 2009.**

B. Further Search of Defendant's Records and Databases

*2 Plaintiff argues that this Court should order Defendant to further search its records and databases, and make inquiry of its employees, for documents and information responsive to Plaintiff's discovery requests. (Docket no. 62 at 2). Plaintiff contends that only cursory inquiries were made to Plaintiff's former supervisors and other possible sources of information. Defendant argues that it has exhausted all sources of information and produced all responsive documents.

Plaintiff has not identified any specific emails or other documents or data that has not been produced. She relies on two excerpts of deposition testimony from Defendant's employees Bruce Downey and Sean Sewell. (Docket no. 56 at 2-4). The Downey deposition excerpt shows that Downey did not ask a person, apparently staff manager Terry Hower, for copies of responsive emails. Downey states that he must have “overlooked” this request. (*Id.*). The other excerpt is of the deposition of Sean Sewell, whom Defendant claims was never a direct supervisor of Plaintiff and which Plaintiff

has not disputed. He was asked if anyone asked him to contribute any documentation or information to respond to Plaintiff's discovery requests. Sewell responded that he remembered receiving an email from Downey “that spoke to getting a list of managers that worked in that area ... just to kind of narrow it down.” (*Id.* at 3). Sewell could not recall anyone contacting him to ask if he had any hard-copy documentation that might relate to Plaintiff's claims. (*Id.*).

Defendant's counsel, Kristofor Hanson, submitted an affidavit stating that he coordinated the collection of information and documents to respond to Plaintiff's discovery requests and that he communicated with the “necessary Michigan Bell employees to appropriately and completely respond to Plaintiff's discovery requests.” (Docket no. 58 ex. A). These communications, Hanson states, “sought information and documents, both electronic and non-electronic.” (*Id.*). Defendant argues that Sewell was asked to search for responsive documents and emails some eight months before his deposition and that he simply failed to recall this request. (Docket no. 58 at 12).

Pursuant to Rule 26 Defendant has the obligation to make “reasonable inquiry” in responding to Plaintiff's discovery requests. [Fed.R.Civ.P. 26\(g\)\(1\)](#). Defendant contends, and Plaintiff has not disputed, that it has produced more than 6,200 Bates-numbered documents and made available to Plaintiff hundreds of additional documents. (Docket no. 58 at 10). Because Defendant's counsel states that he communicated with the appropriate employees to respond to Plaintiff's discovery requests, Plaintiff's reliance upon the Downey deposition excerpt where Downey admits that he did not ask one employee for emails does not show that Defendant failed to make reasonable inquiry. Similarly, Sewell's deposition excerpt showing that he, someone who was apparently never a direct supervisor of Plaintiff, did not recall anyone asking him for hard-copy documentation relating to Plaintiff's claims is simply too slender a reed to support a con-

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clusion that, as a whole, Defendant has not made reasonable inquiry. **Plaintiff's request for the Court to order a further search by Defendant is therefore not warranted.**

C. Records of Employees who had Bucket Trucks

*3 Plaintiff claims that she specifically identified two employees, David Ormsby and Anthony Kalinka, who had bucket trucks assigned to them during the relevant time frame of Plaintiff's claims. Defendant provided the information requested for Ormsby, but Plaintiff argues that Defendant has "expressly declined to provide the records for Anthony Kalinka." (Docket no. 62 at 2). Defendant argues that Plaintiff asked only for the identity and information of those employees who were assigned a bucket truck after July 1, 2003. Because Kalinka was issued a truck prior to July 1, 2003, it argues that the assignment of Kalinka to a bucket truck is not within the scope of Plaintiff's discovery requests. (Docket no. 58 at 15).

The parties cite to different discovery requests to support their arguments. Defendant relies on Plaintiff's Interrogatory No. 2 which asks for information with "regard to the assignment of each aerial lift truck since July 1, 2003 in the Pontiac region." (Docket no. 56 at 18). Plaintiff relies upon her Document Request no. 2 which asks for information about "each person to whom an aerial lift truck (bucket truck) was assigned in the Pontiac Region from July 1, 2003, to the present." (*Id.* at 48). The document request may reasonably be construed to include those employees to whom a bucket truck was assigned prior to July 1, 2003, and which assignment continued after July 1, 2003. This information is relevant to Plaintiff's claims. Therefore, **Defendant must supplement its response to Plaintiff's Document Request no. 2 on or before August 24, 2009 with information about Anthony Kalinka.**

D. Plaintiff's Performance Evaluations for Years 2000-2003

Plaintiff seeks to compel the production of her

performance evaluations for the years 2000-2003. Defendant argues that it has made a reasonable search for these records but is unable to locate them. Plaintiff states that she will consider this issue resolved if Defendant provides an affidavit verifying the unavailability of these documents and any summaries or extracts. (Docket no. 62 at 2-3). **Defendant must provide Plaintiff with an affidavit on or before August 24, 2009 verifying that after reasonable inquiry the missing performance evaluations for the years 2000-2003 and any summaries are not within its possession, custody, or control.**

E. Plaintiff's Second Interrogatories to Defendant nos. 7, 8 & 9

Plaintiff argues that Defendant's objections to Plaintiff's Second Interrogatories to Defendant nos. 7, 8 & 9 should be overruled. These interrogatories ask for, in part, the legal bases including citations to authority for certain contentions of Defendant. (Docket no. 56 at 35-36). Defendant objected based on the work product doctrine. Pursuant to [Fed.R.Civ.P. 26\(b\)\(3\) \(B\)](#) the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." Defendant's objection is appropriate because the interrogatories seek to discover counsel's legal theories, conclusions or opinions. The Court rejects Plaintiff's contention that these interrogatories are proper under [Fed.R.Civ.P. 33\(a\) \(2\)](#), which allows under some circumstances for interrogatories asking for an opinion or the application of law to fact. **Plaintiff's motion to compel further responses to Interrogatories 7, 8, & 9 is denied.**

F. Additional Depositions by Plaintiff

*4 Plaintiff seeks leave to conduct three more depositions of Defendant's employees. This would result in seven depositions being taken by Plaintiff which would be in violation of the Court's previous Order limiting Plaintiff to five depositions. (Docket no. 40). Plaintiff did not conduct all of the five depositions allowed under that Order before the close of discovery. The proposed depositions would be

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for unidentified supervisors. Plaintiff concedes that the identity of these supervisors were made known by Defendant's answers to interrogatories which Defendant states occurred on March 16, 2009, some three and a half months before discovery closed. (Docket no. 58 at 18; no. 61 at 6). Plaintiff in essence argues that she chose the wrong supervisors to depose because those she chose did not provide relevant or sufficient information regarding the decisions made in awarding bucket trucks to employees. (Docket no. 56 at 6). In light of the previous court order and Plaintiff's history of diligence, or lack thereof, during the discovery period of this action, she has failed to show cause to allow these additional depositions. **Plaintiff's request for leave to conduct additional depositions is denied.**

END OF DOCUMENT

G. General Extension of Discovery Deadline

Plaintiff seeks a "reasonable" extension of the discovery deadline to allow for the completion of discovery. Plaintiff has known since April 21, 2009 that no further extensions of the discovery deadline would be granted. (Docket no. 50). Pursuant to [Fed.R.Civ.P. 16\(b\)\(4\)](#) for good cause a court may modify a scheduling order. In light of the previous discussions Plaintiff has failed to show good cause for extending the discovery deadline, with the exception of the specific actions ordered above. **Plaintiff's request for a general extension of the discovery deadline is therefore denied.**

IT IS THEREFORE ORDERED that Plaintiff's Amended Motion to Compel Discovery (docket no. 56) is **GRANTED IN PART AND DENIED IN PART** as set out above.

NOTICE TO THE PARTIES

Pursuant to [Fed.R.Civ.P. 72\(a\)](#), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under [28 U.S.C. 636\(b\)\(1\)](#).

E.D.Mich.,2009.
Jarvis v. Michigan Bell Telephone Co.
Slip Copy, 2009 WL 2475581 (E.D.Mich.)

Slip Copy, 2011 WL 1045545 (E.D.Mich.)
(Cite as: 2011 WL 1045545 (E.D.Mich.))

H

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Christine KHAMI, Plaintiff,
v.
ORTHO-McNEIL-JANSSEN PHARMACEUTIC-
AL, INC., Kevin Gueno, and Reggie Young, De-
fendants.
Civil Action No. 09-CV-11464.
March 17, 2011.

Scott P. Batey, Batey Law Firm, PLLC, Bingham
Farms, MI, Nanette L. Korpi, Southfield, MI, for
Plaintiff.

Carey A. Dewitt, Katherine D. Goudie, Butzel
Long, Detroit, MI, for Defendants.

***ORDER GRANTING IN PART PLAINTIFF'S
SECOND MOTION TO COMPEL MORE COM-
PLETE ANSWERS (DOCKET NO. 75)***

MONA K. MAJZOUB, United States Magistrate
Judge.

*1 This matter comes before the Court on Plaintiff's Second Motion To Compel More Complete Answers To Plaintiff's Second Set Of Requests For Production Of Documents, Plaintiff's Third Interrogatories and Request For Production Of Documents, and Plaintiff's Fourth Request For Production Of Documents. (Docket no. 75). The motion has been referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 76). The motion being fully briefed, the Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(f). This matter is now ready for ruling.

Plaintiff served her Second Request for Production of Documents, her Third Interrogatories and Request for Production of Documents, and her

Fourth Request for Production of Documents on Defendants OMJPI, Gueno, and Young. Defendants served their written responses and objections between December 13, 2010 and January 3, 2011. (Docket no. 75, Ex. 1, 6, 7). Plaintiff now moves for an order compelling more complete responses to the discovery requests. Plaintiff also requests an order permitting her to reopen the depositions of Jan Jeffords Schenck and Defendants Young and Gueno after Defendants fully respond to Plaintiff's discovery requests. The parties' Joint Statement of Resolved and Unresolved Issues indicates that they have been unable to resolve issues related to Plaintiff's Second Request for Production of Documents nos. 2-6, Plaintiff's Third Interrogatories no. 1, and Plaintiff's Fourth Request for Production of Documents nos. 1 and 2.

1. Plaintiff's Second Request for Production of Documents

Document request no. 2 asks Defendants to produce all documents provided to or reviewed by Defendant Gueno in preparation for his testimony to the Grand Jury. Defendants state that they do not have possession of documents that were provided to Defendant Gueno for review or of those documents Defendant Gueno actually reviewed in preparation for his Grand Jury testimony. Defendants also state that other than a set of notes prepared by Plaintiff relating to a meeting with Dr. Connors, Defendant Gueno does not even recall which documents he reviewed in preparation for his Grand Jury testimony. Defendants assert that Defendant Gueno has been unable to locate the set of notes that he did review. Defendants further contend that Defendant Gueno did not retain any documents that he reviewed and cannot recall the names of the attorneys who helped prepare him for the Grand Jury proceedings. Plaintiff claims that Defendants' assertions that they cannot locate documents are disingenuous because Defendants had a document retention policy in place that required the preservation of these documents. Plaintiff further argues that Defendants have

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not set forth what efforts they took to locate the documents, including whether they contacted Ortho-McNeil's corporate counsel who allegedly prepared Defendant Gueno for his Grand Jury testimony to inquire into the identify and whereabouts of these documents.

*2 Plaintiff may serve a request to produce "items in the responding party's possession, custody, or control." [Fed.R.Civ.P. 34\(a\)\(1\)](#). "The word 'control' is to be broadly construed. A party controls documents that it has the right, authority, or ability to obtain upon demand." [Scott v. AREX, Inc., 124 F.R.D. 39, 41 \(D.Conn.1989\)](#) (citations omitted). Defendants' response does not identify whether they have responsive documents within their custody or control. The Court will order Defendants to make reasonable efforts to identify whether corporate counsel including counsel for Ortho-McNeil have the documents Plaintiff seeks, and if so, produce those documents that are within Defendants' possession, custody, or control. If after reasonable effort Defendants are unable to locate any responsive documents, Defendants must serve an amended response on Plaintiff containing a sworn declaration describing with specificity the details of the efforts made to locate documents and declaring that after making reasonable effort Defendants cannot locate any documents within their possession, custody, or control that are responsive to Plaintiff's Second Request for Production of Documents no. 2. [See Potluri v. Yalamanchili, No. 06-13517, 2008 WL 1808377, at *1-2 \(E.D.Mich. April 22, 2008\)](#) (citation omitted), [aff'd, No. 06-13517, 2008 WL 2566367 \(E.D.Mich. June 24, 2008\)](#).

Document request no. 3 asks Defendants to produce all files maintained by Defendants' employees or agents with respect to Plaintiff. Defendants contend that they have produced over two thousand documents comprising the files for Plaintiff retained by Human Resources and her managers, including Defendant Gueno's file. Plaintiff now asks that Defendants confirm that they have produced the requested documents by

supplementing their response to identify by Bates stamp numbers those documents already produced from managers' files including documents produced from the file kept by Defendant Gueno. The Court will grant Plaintiff's motion as to this request.

Document request no. 4 asks Defendants to produce all files maintained by Defendants' employees, agents, affiliates, divisions, parents, etc. in either paper or electronic format, including personnel files, Human Resource files, and managers' files with respect to Defendants Young and Gueno. Defendants object on the basis that the request is overbroad in terms of asking for files maintained by "affiliates, divisions, parents, etc." However, Defendants assert that Defendant OMJPI has mailed Plaintiff a disk containing files related to Defendants Young and Gueno. The Court agrees that document request no. 4 is overbroad in its request for files maintained by Defendants' "agents, affiliates, divisions, parents, etc." As previously discussed, the Court cannot compel a party to produce documents that are not within its possession, custody, or control. [Fed.R.Civ.P. 34\(a\)\(1\)](#). The Court will order Defendants to serve an amended response on Plaintiff containing a sworn declaration that after reasonable inquiry Defendants have produced all documents within their possession, custody, or control that are responsive to document request no. 4.

*3 Document request no. 5 asks Defendants to produce all Viewpoint and/or Prescriber View data related to either [Topamax](#), [Risperdal](#), and [Axert](#) with respect to all regions to which Plaintiff was assigned from 2002-2008. Plaintiff contends that Viewpoint and Prescriber View data is relevant to show whether Defendants had access to data by which they could evaluate sales representatives based on their sales of [Topamax](#) to treat migraines, including sales made to child neurologists. Defendants object on the basis of relevance and that the request seeks confidential and proprietary information. Defendants also contend that the request is overly broad, unduly burdensome, and oppressive in part because Plaintiff requests information on

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Risperdal and *Axert* without providing a basis for doing so, and because the information Plaintiff seeks was updated and changed on a continuous basis. Defendants further contend that there were at least thirty to forty sales representatives at any given time in Plaintiff's regions and the request seeks information on all of these representatives. Plaintiff does not identify why she requests information related to *Risperdal* and *Axert*. The Court will grant Plaintiff's motion as to *Topamax* only.

Document request no. 6 asks Defendants to produce all documents regarding the assigning of physicians or medical personnel to the pharmaceutical sales representatives' "call plans" for all regions to which Plaintiff was assigned from 2002-2008. Defendants object on the grounds that the request is overly broad, unduly burdensome, oppressive, seeks information that is irrelevant, and requests information that is confidential and proprietary. The Court is prepared to grant Plaintiff's motion as to this request. However, the parties' Joint Statement reveals that Defendants have learned that their call plan information for the requested time period is in off-site storage on back-up tapes. Defendants contend that they have offered to review the back-up tapes and compile whatever call plans are available for the sales representatives in Plaintiff's district from 2002 to 2008, rather than for her entire region, and that Plaintiff has agreed to this resolution. (Docket no. 85 at 4).^{FN1} Accordingly, based on assertions made in the parties' Joint Statement, issues pertaining to document request no. 6 appear to have been resolved and Plaintiff's motion as to this request is moot.

^{FN1}. Defendants refer to document request no. 5 when making this argument. However, document request no. 6 is the request that seeks call plan information. Therefore, the Court has considered Defendants argument in response to document request no. 6 rather than document request no. 5.

2. Plaintiff's Third Interrogatories and Request for

Production of Documents

Interrogatory no. 1 asks Defendants to identify all persons employed by Defendant OMJPI, its parent, division, subsidiary, affiliate, or any company within the Johnson & Johnson Family of Companies who were either subpoenaed or who provided testimony to the Grand Jury related to offlabel marketing. On February 3, 2011 the Court ordered Defendants to provide this information to Plaintiff. (Docket no. 77). Defendants contend that they are currently compiling responsive information. The Court will order Defendants to respond by a date certain.

3. Plaintiff's Fourth Request for Production of Documents

*4 Document request no. 1 asks Defendants to produce all documents referenced by Defendant Gueno at pages 200-201 of his deposition, including the spreadsheets and all documents relating to the spreadsheets referenced by Defendant Gueno. Defendants object on the basis that the request is overly broad, unduly burdensome, and irrelevant. The Court will grant Plaintiff's motion as to this request.

Document request no. 2 asks Defendants to provide all documents that address, reference, support or refute that Defendant OMJPI and/or Johnson & Johnson or any company in the Johnson & Johnson Family of Companies ever undertook any measures to remove information or data regarding the marketing of *Topamax* to child neurologists for the treatment of migraines either from the data used to establish business planning and/or from the data used or considered in any way to evaluate, benchmark or otherwise track the performance of sales representatives. Defendants object on the basis that the request is vague, overly broad, unduly burdensome, and seeks irrelevant information. The Court finds that document request no. 2 is overbroad. Plaintiff's motion will be denied as to this request.

4. Request to Reopen the Depositions of Jan Jeffords Schenck, Defendant Young, and Defendant Gueno

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Plaintiff asks that the Court allow her to reopen the depositions of Jan Jeffords Schenck, Defendant Young, and Defendant Gueno after Defendants have been ordered to fully comply with Plaintiff's discovery requests. (Docket no. 72). Defendants did not respond to this request. [Federal Rule of Civil Procedure 30](#) provides that unless otherwise stipulated or ordered by the court, "a deposition is limited to 1 day of 7 hours." [Fed.R.Civ.P. 30\(d\)\(1\)](#). "A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2) if the parties have not stipulated to the deposition and ... the deponent has already been deposed in the case." [Fed.R.Civ.P. 30\(a\)\(2\)\(A\)\(ii\)](#). Plaintiff has stated that Jan Jeffords Schenck, Defendant Young, and Defendant Gueno have been deposed yet the lengths of the depositions are unknown. Plaintiff's need to depose each of these three witnesses again is speculative at this time. In addition, Plaintiff has not indicated that the parties refuse to stipulate to reopening the depositions. [Fed.R.Civ.P. 30\(a\)\(2\)\(A\)](#). Based on the Court's lack of information as to the extent of the depositions to date, the speculative nature as to whether depositions of each of the three witnesses will be necessary, and the Plaintiff's silence as to whether the parties will stipulate to the depositions, the Court will deny without prejudice Plaintiff's request to re-depose Jan Jeffords Schenck, Defendant Young, and Defendant Gueno.

IT IS THEREFORE ORDERED that Plaintiff's Second Motion To Compel More Complete Answers To Plaintiff's Second Set Of Requests For Production Of Documents, Plaintiff's Third Interrogatories and Request For Production Of Documents, and Plaintiff's Fourth Request For Production Of Documents (docket no. 75) is **GRANTED IN PART** as follows:

*5 1. Defendants must make reasonable efforts to identify whether corporate counsel including counsel for Ortho-McNeil have documents responsive to Plaintiff's Second Request for Production of Documents no. 2 and if so, must pro-

duce those documents that are within Defendants' possession, custody, or control. If after reasonable effort Defendants are unable to locate any responsive documents, Defendants must serve an amended response on Plaintiff containing a sworn declaration describing with specificity the details of the efforts made to locate documents and declaring that after making reasonable effort Defendants cannot locate any documents within their possession, custody, or control that are responsive to Plaintiff's Second Request for Production of Documents no. 2.

2. Defendants must supplement their response to Plaintiff's Second Request for Production of Documents no. 3 by identifying by Bates stamp numbers those documents already produced from managers' files including documents produced from the file kept by Defendant Gueno.

3. Defendants must serve an amended response on Plaintiff containing a sworn declaration that after reasonable inquiry Defendants have produced all documents within their possession, custody, or control that are responsive to Plaintiff's Second Request for Production of Documents no. 4.

4. Defendants must produce documents responsive to Plaintiff's Second Request for Production of Documents no. 5 relative to [Topamax](#) only.

5. Defendants must provide Plaintiff with the information requested in Plaintiff's Third Interrogatories no. 1 pursuant to the order entered February 3, 2011 at docket no. 77.

6. Defendants must produce documents responsive to Plaintiff's Fourth Request for Production of Documents no. 1.

7. All discovery responses ordered herein must be served on Plaintiff on or before May 2, 2011.

8. Plaintiff's request for sanctions under [Federal Rule of Civil Procedure 37](#) is denied.

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NOTICE TO THE PARTIES

Pursuant to [Fed.R.Civ.P. 72\(a\)](#), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under [28 U.S.C. § 636\(b\)\(1\)](#).

E.D.Mich.,2011.
Khami v. Ortho-McNeil-Janssen Pharmaceutical,
Inc.
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END OF DOCUMENT



**ROBERT OSBORNE AND MARINA BAY TRANSPORTATION, L.L.C.,
Plaintiffs, vs. C.H. ROBINSON COMPANY, Defendant.**

Case No. 08 C 50165

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, WESTERN DIVISION**

2011 U.S. Dist. LEXIS 123168

**October 25, 2011, Decided
October 25, 2011, Filed**

COUNSEL: [*1] For Robert Osborne and Marina Bay Transportation, L.L.C., an Illinois limited liability company, Plaintiff: Thomas G. Ruud, LEAD ATTORNEY, Thomas G. Rudd & Associates, P.C., Rockford, IL.

For C.H. Robinson Company, a Minnesota corporation, Defendant: John James Holevas, LEAD ATTORNEY, Joel M. L. Huotari, Marc Charles Gravino, WilliamsMcCarthy, Rockford, IL.

JUDGES: P. MICHAEL MAHONEY, MAGISTRATE JUDGE. Judge Frederick Kapala.

OPINION BY: P. MICHAEL MAHONEY

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Robert Osborne ("Osborne") is the sole member of Marina Bay Transportation, L.L.C. ("Marina Bay"), a local trucking operation. Defendant, C.H. Robinson Company, is a shipping and warehousing company that contracts with local companies as part of its operation. Plaintiff's complaint alleges that an employee of Defendant promised Plaintiff certain "lock down

business" - in excess of \$1 million in "gross/net" proceeds - if Plaintiff made certain investments to create warehousing facilities. Plaintiffs allege they made the investments, but Defendant stopped delivering the lock down business after only a few months, causing Plaintiff to suffer financial losses on their investments.

As discovery has unfolded, there have been [*2] allegations that Osborne attempted to bribe Defendant's employee for the "lock down" business, and counter-allegations that it was Defendant's employee that solicited the bribes after Plaintiff was already on the hook for the improvements to his facilities. Plaintiff believes that the promised "lock down business" was directed to other companies, and has attempted to discover what comparable shipping business went through other customers or warehouse locations. The discovery dispute in this case resulted from difficulties Plaintiff had in getting Defendant to search for and turn over records for comparable companies and locations.

Because of the extended difficulties the parties have had with discovery throughout this case, a summary of the motions filed and court orders is helpful. On July 2, 2010, Plaintiff filed a motion to compel because Defendant's discovery responses were overdue. The court granted the motion in part on July 23, 2010. When Defendant tendered discovery, it did not answer certain requests, and stated that some documents were

voluminous and only available for inspection at its headquarters in Eden Prairie, Minnesota. Seeking to avoid traveling to Minnesota for document [*3] inspections, Plaintiff's counsel sent letters on July 30, 2010 and August 6, 2010 asking whether the voluminous documents were available in electronic formats, and if so, what formats. On August 24, 2010, Plaintiff filed a motion for contempt, alleging that Defendant had not answered supplemental production requests or Plaintiff's inquiries as to the electronic production of the voluminous documents. The documents Defendant described as voluminous were supposedly documents responsive to requests for shipping records relating to three companies: Suncraft, Master Graphics, and Dixon Web. The court granted the motion in part at a September 17, 2010 hearing based on Defendant's counsel's representation that his client thought the documents could be produced electronically, and that they would attempt to do so. The court reserved ruling on the portion of Plaintiff's motion requesting attorney's fees.

On October 1, 2010, Defendant sent Plaintiff thousands of pages of PDF files consisting of records relating to Suncraft. There were no records relating to Master Graphics or Dixon Web produced. Over the course of status hearings with the court on October 8, 2010, October 29, 2010, and November [*4] 24, 2010, the parties exchanged information to explain the difficulties with the search and to clarify the requests for information as to Master Graphics or Dixon Web. Plaintiff sought answers as to how and why Defendant performed its searches, and the court suggested that Plaintiff could proceed with a Rule 30(b)(6) deposition. Defendant explained that Dixon Web and Master Graphics were, in fact, "pick-up locations" rather than "customers," which is what Defendant believed Plaintiff was seeking. Counsel for Defendant stated that pick up locations often have varying names, like "E&D Web" or "Dixon Direct" rather than "Dixon Web." The court ordered Defendant to perform a general query of its database for "Dixonweb" and "Master Graphics." On December 12, 2010, Defendant produced information as a result of the clarifications made during the October and November hearings. All materials were produced as individual PDF documents.

On December 13, 2010, Defendant filed a motion for a protective order in response to Plaintiff's notice for a 30(b)(6) deposition. The court granted Defendant's motion in part and converted two of the three deposition

topics to interrogatories. Plaintiff maintained [*5] that Defendant's answers did not explain the difficulties in obtaining the documents as to Dixon Web and Master Graphics and insisted that the documents should have been provided in a more usable format. Through March and April of 2011, the parties engaged in discovery relating to Defendant's electronic search efforts. Plaintiff issued a supplemental interrogatory and took the depositions of two employees of Defendant, Mr. Wilson and Mr. Lyons. It was after this discovery process that Plaintiff filed the discovery motions currently before the court.

On April 15, 2011, Plaintiff filed a second motion to compel Defendant to turn over information on the electronic database of Defendant and also sought the production of previously turned-over PDF documents in a more usable format. The court denied that part of the second motion to compel seeking more usable electronic information based on Defendant's assertion that it had already created a response in a more appropriate format and was turning it over to Plaintiff. On April 28 2011, Plaintiff filed a second motion for contempt encompassing many of the same issues described above. Plaintiff also filed a motion to compel depositions and a [*6] third motion to compel Defendant to answer Plaintiff's supplemental interrogatories on May 5, 2011 and May 6, 2011, respectively. The court placed the motion for contempt, second motion to compel, and motion to compel depositions on a consolidated briefing schedule. Plaintiff also filed a motion for reconsideration of the court's ruling on the second motion for contempt, which the court assumes was meant to refer to the second motion to compel. All of the above has been fully briefed by the parties.

Plaintiff's combined briefing on the various discovery motions culminated in a request for a default judgment as a discovery sanction. A sanction that would serve as a final judgment in a case is dispositive, and was therefore referred to the District Court. *See Egan v. Freedom Bank, et al., No. 10-1214, 2011 U.S. App. LEXIS 20205, *14 (7th Cir. Oct. 6, 2011)*. Recognizing that such a remedy should be used as a sanction "only in extreme situations, or when other less drastic sanctions have proven unavailing," the District Court held on September 9, 2009 that Plaintiff's motion for a default judgment should be denied. (Minute Order of Sept. 9, 2011, Dkt. No. 103.) The case was referred back to the Magistrate [*7] Judge for further ruling on whether

lesser sanctions are appropriate.

The discovery issues before the court related to electronic discovery procedures. It does not appear that the parties anticipated the need to establish an electronic discovery protocol for this case. Since this case was initiated, the Seventh Circuit Electronic Discovery Committee has developed a Proposed Standing Order relating to the discovery of electronically stored information¹. The Proposed Standing Order, in conjunction with the Sedona Principles, offer insight as to ideal ways for litigants to proceed once the need for electronic discovery has been identified.

1 Discovery Pilot: Seventh Circuit Electronic Discovery Pilot Program, www.discoverypilot.com (last visited October 20, 2011). The Program Committee for the Seventh Circuit Electronic Discovery Pilot Program was formed in May 2009 "to conduct a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties" while at the same time reducing the cost and burden of electronic discovery.

Principle 2.05 of the Proposed Standing Order refers to the process for the [*8] parties to identify electronically stored information. It suggests that the parties should discuss how to filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters. It also suggests that the parties should discuss using keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies². Regarding production format, Principle 2.06 suggests that the parties should make a good faith effort to agree on the format(s) for production of ESI. Principle 2.06(b) states:

[t]he parties should confer on whether ESI stored in a database or a database management system can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.

Overall, the emphasis of the Proposed Standing Order is that the parties should proactively engage in a good faith

discussion as to the most reasonable and efficient means to search and produce electronic information.

2 Principal 2.05(b) contains a non-inclusive list of topics for discussion between the parties. The entire Proposed Standing [*9] Order can be accessed through the Seventh Circuit Electronic Discovery Pilot Program website, at http://www.discoverypilot.com/sites/default/files/StandingOrder8_10.pdf (last visited October 17, 2011).

Similarly, the Sedona Principles³ contain guidance as to how parties should proceed with electronic discovery. Comment 4.a indicates that requests for production should clearly specify what electronically stored information is being sought, while avoiding "the sort of blanket, burdensome requests for electronically stored information that invite blanket objections and judicial interventions." *The Sedona Principles, Second Edition* (2007), Cmt. 4.a. Where the parties have not previously agreed on a production format, the producing party may either produce the information in the format in which it is ordinarily maintained, or a form that is reasonably usable. *Id.*; *Fed. R. Civ. P. 34(b)(2)*. The responding party has a similar obligation to make specific objections or to indicate the extent to which the requested production will be limited by undue burden or cost of production. *The Sedona Principles, Second Edition* (2007), Cmt. 4.b. Where a requesting party has not specified a form or forms [*10] for the requested production, or if the responding party objects to the form requested, "the responding party must identify the form or forms it intends to use." *Id.* The parties should attempt to reach an agreement on the forms of production based on the various needs of the parties concerning the data. *The Sedona Principles, Second Edition* (2007), Cmt. 12.b.

3 *The Sedona Principles, Second Edition: Best Practices, Recommendations and Principles for Addressing Electronic Document Production* (The Sedona Conference Working Group Series, 2007).

Electronic discovery was not addressed at the Rule 26(f) conference in this case, and there is no indication that the parties reached any type of agreement on the matter. The potential for electronic discovery arose when Plaintiff inquired as to whether it could be used as an alternative to an on-site document inspection. The court views the Seventh Circuit Electronic Discovery Program

and the Sedona principles as guideposts by which the parties actions should be judged once they engaged in electronic discovery.

Plaintiff's counsel initially raised the possibility of electronic discovery in letters to Defendant's counsel dated July 30, 2010 and August [*11] 6, 2010. Both letters asked what information would be available in electronic format. The August 6, 2010 letter further suggested that certain information might be appropriately tendered in a format previously used by the parties, while other information might be more useful in "Excel format or as tab or comma separated values as it regards billing to the customers." (Pl's Brief in Support, Dkt. No. 85, Ex. G & H.) Defendant offers no explanation as to why it did not respond to Plaintiff's counsel's letters regarding electronic discovery. Defendant has also failed to explain why it took until October 1, 2010, the date upon which it turned over thousands of PDF documents responsive to the Suncraft request, to inform Plaintiff that it found no documents responsive to the Master Graphics and Dixon Web requests.

As described above, the parties spent the next few months attempting to sort out issues with regard to the Master Graphics and Dixon Web discovery requests. Plaintiff issued supplemental interrogatories and took depositions of at least two of Defendant's employees regarding their electronic searches and production. Defendant presented a number of explanations to account for the [*12] delays and confusion in producing responsive documents to Plaintiff in a usable format.

As to the search for records relating to Dixon Web, Defendant argues that it accurately represented the fact that a search for "Dixon Web" as a customer in its database yielded no results. The reasons put forward for the lack of results were that Dixon Web was a "pick-up location" rather than a "customer," and that pick-up locations often were referenced using various aliases. For example, the Dixon Web entity was referred to in Defendant's database as "Dixonweb Publishing" and "Dixon Direct." Therefore, a search for the exact words "Dixon Web" yielded no results. Defendants emphasize that Plaintiff never asked for a search of aliases related to Dixon Web, nor did he ask for a search to be performed based on a customer number or any other criteria.

Plaintiff believes that Defendant, or at least some of its employees, knew what Plaintiff was looking for as early as July of 2010. On July 9, 2010, Mr. Wilson sent

an email to Mr. Lyons with the Subject line "Here is the info needed for the Marina Bay lawsuit." The email appears to list information necessary to search for all carriers that shipped for [*13] Suncraft, Dixon Web, and Master Graphics, along with information about loads, invoices for shipments, and bills of lading as to each entity. Next to each entity listed in the email is a customer number. (Pl's Brief in Support, Dkt. No. 85, Ex. K.) Plaintiff attached an exhibit to his memorandum showing a spreadsheet with the results of a search for the customer number listed next to Dixon Web in Mr. Wilson's email. The spreadsheet lists nearly 300 loads for the customer names "Dixon Direct" and "Dixonweb Publishing". (Pl's Brief in Support, Dkt. No. 85, Ex. AE.) Plaintiff also discovered a spreadsheet created on July 19, 2010 that lists the search results for a "Warehouse Load History" as to a Customer called "E&D Web, Inc.". (Pl's Brief in Support, Dkt. No. 85, Ex. M.) Finally, Plaintiff emphasizes that he never labeled Dixon Web as a customer. Rather, his discovery request sought billing records sent from Defendant "to the customer for shipment of printed material *from* Dixon Web, Master Graphics or Suncraft where Marina Bay Transport was the carrier during 2007" (emphasis added).

Defendant's explanations as to Dixon Web do not tend to show a good faith effort to work out discovery [*14] issues with Plaintiff. The evidence shows that Defendant recognized what Plaintiff was looking for as early as July 9, 2010. Defendant also knew that Dixon Web was referred to using various aliases, including "Dixon Direct," "Dixonweb Publishing," and "E&D Web, Inc." in its internal databases. In fact, Defendant's employees were able to search and produce Excel databases based on its own internal information. How would Plaintiff know that the term Dixon Web would be insufficient to refer to all Dixon Web aliases that Defendant chose to use? Mr. Wilson's email actually refers to "Dixon Web," whereas the attached databases refer to "Dixon Direct" or "Dixonweb Publishing." Even after Defendant was presented with one of its own "Load Confirmation" documents containing information for "Dixonweb Printing," it did not turn over documents to Plaintiff. It appears that Defendant opted to wait for Plaintiff to try to guess the precise search terms and categories that Defendant should use to search its database for an entity that Defendant already knew how to find. The court is persuaded that Defendant knowingly made the process more difficult when it chose not to communicate with Plaintiff once [*15] it made initial

discoveries relating to the Dixon Web entities.

Turning to Master Graphics, Defendant appears to rest on the explanation that it believed Plaintiff was looking for a "customer" with that name. As with Dixon Web, Plaintiff never described Master Graphics as being a customer. Defendant argues it was technically true that no customer records for Master Graphics were identified during the initial search of the customer field of the database. It is undisputed that Defendant knew of a warehouse identification number for Master Graphics as early as the July 9, 2010 email. It was Defendant's choice to limit its search to the "customer" field of its searchable data. Without information about Defendant's search capabilities, Plaintiff was not obligated to request the precise name and search category for an entity, down to capitalization and spelling, as it is stored in Defendant's system.

It was not until after a November 24, 2010 hearing before the court that Defendant was able to locate responsive records in electronic format. At the hearing, the court ordered Defendant to conduct a general query using the search terms "Dixonweb" and "Master Graphics." The type of discussion [*16] that took place in court is exactly the type that the Sedona Principles and the Seventh Circuit Electronic Discovery Program contemplate the parties having in good faith. Once the court ordered the general query, the documents were produced in less than three weeks. The court finds that neither party followed ideal practices regarding electronic discovery. However, the evidence shows that Defendant had pertinent information, knew what Plaintiff was looking for, knew how to retrieve it, and knowingly prolonged the process by not engaging in reasonable communications with Plaintiff.

As of December 12, 2010, Plaintiff had received documents responsive to his requests relating to Dixon Web and Master Graphics. Plaintiff wanted the requested information in order to perform certain calculations, such as the amounts Defendant paid to similar carriers or billed to other customers in the same region. Defendant produced the information as individual PDF files, which Plaintiff would have to manually inspect in order to recreate his own usable file. Defendant maintained the information in a searchable format that was capable of performing calculations. It was not an unreasonable request for Plaintiff [*17] to seek information in either the same format that Defendant keeps it or a similarly

manipulable format. *See U.S., ex rel. Liotine v. CDW Government, Inc.*, 2011 U.S. Dist. LEXIS 44649, 2011 WL 1576555, at *3 (S.D. Ill. Apr. 26, 2011) (ordering a defendant to produce sales data contained in a database in the same format or a similarly manipulable format as the defendant kept it).

Plaintiff filed a motion to compel on April 15, 2011 seeking production of the electronic documents in a usable format. The motion was presented on April 27, 2011, at which time counsel for Defendant conveyed how Defendant operated a proprietary computer system that did not produce documents that would be readable on a regular personal computer. Defense counsel described how a custom script would have to be created and run on Defendant's computer system in order to collect and export data to an Excel file. This process was said to take a certain amount of "horsepower" and only certain employees were authorized to extract the information. In its written response to Plaintiff's motion, Defendant emphasized that it would create usable files at its own expense in order to comply with Plaintiff's request. Based on Defendant's response, the court [*18] denied Plaintiff's motion to compel. Plaintiff continued to pursue the matter through its second motion for contempt, believing that Defendant was not forthright about the difficulties, or lack thereof, in turning over usable files.

The court will not revisit its ruling on the second motion to compel, as it appears Plaintiff's counsel received what he was seeking. Plaintiff's concerns as to the delays in receiving usable information merit further consideration. Specifically, Plaintiff produced deposition testimony from two of Defendant's employees familiar with the searches in this case. Mr. Lakotish testified that a custom script can be run in Defendant's computer program to perform certain searches. (Pl's Brief in Support, Dkt. No. 85, Ex. AH.) The results of a search would appear in an "output grid" that an individual with the right credentials would have the option of exporting to an Excel file. (*Id.*) The resulting Excel file would be created automatically and would have rows and columns of data. (*Id.*) Mr. Lyons testified that in July of 2010, Mr. Wilson asked him to run queries on certain customer and carrier codes and to pull documentation such as bills of lading and invoice data. [*19] (Pl's Brief in Support, Dkt. No. 85, Ex. AI.) Mr. Lyons was able to search the data and send it to Mr. Wilson in Excel format, but he was unable to pull up all of the attached documents. (*Id.*) The process of exporting the data to Excel was described as

"very simple." (*Id.*).

Nevertheless, Defendant believes it fulfilled its obligations by producing documents in PDF format. Defendant cites to Comment 12.b. of the Sedona Principles in support of a theory that production in PDF or Tagged Image File ("TIFF") format is a presumptively reasonable format for electronic production. The Sedona Principles acknowledge that electronic information can be transmitted in many forms, and some are more useful than others depending on the circumstances. *The Sedona Principles, Second Edition* (2007), Cmt. 12.b. PDF and TIFF files have a static format that can be advantageous, but they can also be time consuming to create and lose searchable text and metadata that might enable the parties to more efficiently digest the information. *Id.* Plaintiff was apparently looking for information he could use to make calculations and comparisons. Under the circumstances, turning over thousands of PDF files without first [*20] communicating with Plaintiff was not presumptively reasonable.

The court believes the parties could have resolved their issues regarding the data searches and production had they conferred in good faith. Had Plaintiff's counsel initially agreed to travel to Defendant's office in Minnesota, he might have obtained the data he was looking for, or at least gained an understanding of Defendant's search capabilities. Defendant should have responded to Plaintiff's written inquiries about the potential for electronic discovery. Electronic discovery is often an iterative process and the parties should allow for refinement of search terms as their understanding of the issues develops. *The Sedona Principles, Second Edition* (2007), Cmt. 11.a. The parties should also discuss how the materials may be produced. Plaintiff attempted to open a dialogue with his letters and requests. Defense counsels' delayed representations about the difficulties involved in producing data to Plaintiff do not align with the straightforward answers given by Defendant's employees. It is also inconsistent with the fact that Defendant's employees had conducted relevant searches and created usable Excel documents more than [*21] nine months prior to turning similar information over to Plaintiff. Plaintiff should not have needed to take depositions from Defendant's employees in order to learn how Defendant's data could be produced.

Plaintiff contributed to the delays in this case by aggressively pursuing motions to compel and for sanctions

when there may have been opportunities for more amicable resolutions. Plaintiff filed his second motion to compel in an attempt to get usable electronic discovery from Defendant. While presenting this motion, Plaintiff informed the court he would be filing a second motion for contempt regarding the electronic discovery issues. Within ten days of filing the second motion for contempt, Plaintiff filed a motion to compel depositions and a third motion to compel seeking responses to his discovery requests related to Defendant's electronic production efforts. On May 11, 2011, the court continued Plaintiff's motions and ordered the parties to conduct a Local Rule 37.2 conference, including telephonic participation from Mr. Lakotish, regarding discovery issues. The parties conducted the conference, and counsel for Defendant followed-up in an email to Plaintiff attempting to resolve [*22] some of the issues. Defense counsel suggested that it was working to deliver the materials that Plaintiff was seeking, and that the parties could work together to "get this case back on track." Plaintiff opted to push forward with his motions. Portions of each of Plaintiff's motions contain overlapping allegations, or sought relief that had already been requested. For example, Plaintiff's second motion to compel, second motion for contempt, and third motion to compel all sought sanctions based on Defendant's conduct. Plaintiff's duplicative motion practice may have diverted the parties' efforts away from finding reasonable solutions to discovery issues.

In summary, Defendant was late in responding to some of Plaintiff's discovery requests, and failed to respond to Plaintiff's good faith attempts to open a dialogue about electronic discovery. There is also evidence that Defendant knew what Plaintiff was seeking, but was deliberately evasive and caused unnecessary delay prior to disclosing the requested information. Defendant's actions were not in line with the letter or spirit of the Federal Rules of Civil Procedure, the Proposed Standing Order from the Seventh Circuit, or the Sedona [*23] Principles describing best practices for electronic discovery. *See FED. R. CIV. P. 37(a)(4)*; Discovery Pilot: Seventh Circuit Electronic Discovery Pilot Program, Proposed Standing Order, Principle 2.06, www.discoverypilot.com (last visited October 20, 2011). Based on Defendant's conduct, the court will award reasonable attorney's fees related to Plaintiff's efforts to obtain the electronic discovery he was seeking in a reasonably usable format.

In determining what constitutes reasonable attorney's

2011 U.S. Dist. LEXIS 123168, *23

fees, the court will take into consideration Plaintiff's actions in filing unnecessarily repetitive discovery motions. Plaintiff was correct about Defendant's delay and misinformation regarding certain discovery, but Plaintiff failed to mitigate litigation costs once counsel for Defendant made efforts to retrieve all of the information Plaintiff was seeking in order to get the case back on track. Plaintiff should not be awarded fees or expenses for costs incurred while briefing duplicative or repetitive motions. *See, e.g. Jacobeit v. Rich Twp. High School Dist.* 277, 2011 U.S. Dist. LEXIS 56222, 2011 WL 2039588, at *8 (N.D. Ill. May 25, 2011) (finding a sanction of fees appropriate, but limiting fees based on overly inclusive [*24] and repetitive submissions by the plaintiff).

In light of all of the above, the court finds as follows:

1. Plaintiff's motion for contempt filed on August 24, 2010 is granted as to Plaintiff's request for reasonable attorney's fees. The court finds that this motion, which was filed after Defendant failed to respond to two of Plaintiff's letters, was successful in getting Defense counsel to speak with his client regarding electronic discovery.

2. Plaintiff's second motion for contempt, filed on April 28, 2011, is granted in part. This motion encompassed all or nearly all of the discovery violations that the court finds Defendant committed. Defendant is to pay all of Plaintiff's attorney's fees and costs associated with filing and presenting this motion. The motion is denied as to all other relief sought by Plaintiff.

3. Plaintiff's motion to compel depositions of Dave Lyons and a Rule 30(b)(6) deponent is denied. The relief sought in this motion was sought in Plaintiff's second motion for contempt,

and is otherwise moot. Plaintiff shall not be reimbursed for any fees or costs associated with this motion.

4. Plaintiff's third motion to compel is denied. This motion requests that Defendant [*25] produce electronic discovery in a usable format, which was addressed in Plaintiff's second motion for contempt and mooted by Defendant's eventual production. The motion also seeks answers to Plaintiff's supplemental interrogatories, which Defendant did attempt to answer, or otherwise mooted through the production of employees for depositions.

5. Plaintiff's motion for reconsideration of the court's denial of Plaintiff's second motion for contempt, which the court takes as a motion pertaining to Plaintiff's second motion to compel, is denied.

6. Defendant is ordered to pay Plaintiff's reasonable attorney's fees and costs associated with taking the depositions of Mr. Lyons and Mr. Lakotish.

Plaintiff is to file an affidavit in support of his request for reasonable fees and costs by December 1, 2011.

ENTER:

/s/ P. Michael Mahoney

**P. MICHAEL MAHONEY, MAGISTRATE
JUDGE**

UNITED STATES DISTRICT COURT

DATE: October 25, 2011

Slip Copy, 2006 WL 6686584 (E.D.Mich.)
(Cite as: 2006 WL 6686584 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Yvette STOKES, Plaintiff,
v.
XEROX CORPORATION, Defendant.

Civil Action No. 05-CV-71683-DT.
Oct. 5, 2006.

Kathleen L. Bogas, Charlotte Croson, Law Offices
of Kathleen L. Bogas, PLLC, Bingham Farms, MI,
for Plaintiff.

Jerome R. Watson, Miller, Canfield, Detroit, MI,
Leigh Greden, Linda O. Goldberg, Miller, Canfield,
Ann Arbor, MI, for Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S EMERGENCY MOTION TO QUASH SUBPOENA ISSUED TO LAURENCE CROCKETT AND FOR PROTECTIVE ORDER AND GRANTING DEFENDANT'S MOTION TO COMPEL PURSUANT TO RULE 37(a)(2) (B)

MONA K. MAJZOUB, United States Magistrate Judge.

*1 Before the Court are Defendant's Emergency Motion to Quash Subpoena issued to Laurence Crockett and for Protective Order filed on September 25, 2006 (docket no. 34), and Defendant's Motion to Compel Pursuant to Rule 37(a)(2)(B) filed on August 16, 2006 (docket no. 31). Following briefing on the motions, the Court entertained oral argument on October 3, 2006.

I. FACTUAL BACKGROUND

This is an employment discrimination case where the Plaintiff is alleging that Defendant terminated her employment due to race and gender in November 2003. Defendant claims Plaintiff was terminated due to poor performance. Plaintiff was

employed as a sales representative for Defendant in its Public Sector Organization. Discovery ended on September 29, 2006. On September 21, 2006 Plaintiff mailed a subpoena *duces tecum* under Fed.R.Civ.P. 45 to an employee of Defendant, Laurence Crockett (Crockett), purporting to command him to produce records at his deposition on September 29, 2006. Crockett is now a sales representative for Defendant in a different organization of Defendant. At the time of Plaintiff's employment, Crockett was a support person in the Public Sector Organization.

Plaintiff's subpoena seeks from Crockett the production of three classes of documents. The first class covers "any and all documents in your possession, ..., relating to or concerning any and all accounts, including but not limited to the Baker College account, that you worked on with [Plaintiff] and/or Andre Dortch as [Plaintiff's] and/or Mr. Dortch's Production Specialist." The second class is virtually identical to the first except that it includes "order and install documents" in the listing of documents. The third class covers "any and all documents ... relating to or concerning assignment of territories, change in territory assignment, size of territories, location of territories, territory potential, and opportunities within territories within the Public Sector Organization during the time you were a Production Specialist in the Public Sector Organization." This last class is not limited to documents in Crockett's possession as are the first two classes. The deposition of Crockett that was scheduled for September 29 did not take place.

The second motion is Defendant's motion to compel Plaintiff to testify at a deposition regarding her prior employment with the Detroit Metro Convention and Visitors Bureau (Bureau), her discharge from employment, and the terms on which she settled her lawsuit against the Bureau. Plaintiff cited a confidentiality agreement executed in her previous lawsuit against the Bureau when questioned on these subjects in her deposition. The Bur-

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eau has agreed to waive confidentiality and allow Plaintiff to testify about the prior litigation including the terms of settlement if Plaintiff waives the confidentiality provisions of the agreement as applicable to all other parties, or she is ordered by the court to give testimony regarding the prior litigation and settlement, and the information disclosed about the prior litigation is kept confidential and under seal in this litigation.

II. STANDARD

*2 The decision whether to quash or modify a subpoena is within the court's discretion. 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 at 19 (Supp.2006). Under Rule 45(c)(3)(A), the court "shall" quash or modify the subpoena if it fails to allow reasonable time for compliance, requires the disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden. With regard to the motion to compel, Fed.R.Civ.P. 37(a)(2)(B) allows a party to move for an order compelling a deponent to answer a question, and the Court has broad discretion to make such orders as are just under that rule. *Concrete Materials Corp. v. C.J. Mahan Constr. Co.*, 110 F.3d 63 (6th Cir. Mar. 28, 1997) (unpublished).

III. DEFENDANT'S MOTION TO QUASH

A. Standing

Plaintiff argues in her Response that Defendant lacks standing to move to quash the subpoena directed to Crockett. At oral argument, Plaintiff's counsel did not argue this point. Instead, counsel directed her argument to whether the subpoena was properly issued. Based upon the briefs submitted, the Court finds that Defendant has standing. Plaintiff's subpoena is directed to Defendant's documents relating to account and territory information which Crockett would not have access to or possession of except for his employment by Defendant. Crockett is therefore acting as a representative for Defendant as to this document request. Under such circumstances, Defendant has standing to challenge

the subpoena served upon its intended representative. See *Joiner v. Choicepoint Servs., Inc.*, 2006 WL 2669370 (W.D.N.C. Sept.15, 2006) (defendant-employer allowed to move to quash subpoenas directed to its employees seeking documents belonging to defendant).

B. Propriety of the use of Rule 45 rather than Rule 34

Defendant's primary contention is that Plaintiff should be proceeding under Fed.R.Civ.P. 34 to obtain the requested documents rather than under Rule 45. Defendant seeks to show that the request under Rule 45 is unduly burdensome and oppressive, and therefore that the subpoena should be quashed. See *Joiner*, 2006 WL 2669370 (granting motion to quash portions of subpoena requiring employees to provide documentation belonging to defendant corporation as unreasonable and oppressive).

Plaintiff argues that her subpoenaing of Crockett under Rule 45 is proper because he is a nonparty. However, as stated previously, in this case Crockett is acting as the representative of Defendant. The subpoena seeks documents belonging to Defendant. This fact is clear because Plaintiff admits in her Response that the documents sought by the subpoena are subsumed within the production requests under Rule 34 she made to Defendant in April 2006. (Pl's br. in Opposition, docket no. 37, at 8). Plaintiff proceeded under Rule 45 with the subpoena to Crockett only when she was not satisfied with Defendant's response to the earlier production requests. Therefore, the Court will consider Plaintiff's Rule 45 subpoena to Crockett to be an attempt to subpoena the records of a party rather than a nonparty.

*3 The leading treatises agree that although Rule 45 may apply to both parties and nonparties, resort to Rule 45 should not be allowed when it circumvents the requirements and protections of Rule 34 for the production of documents belonging to a party. "If documents are available from a party, it has been thought preferable to have them obtained pursuant to Rule 34 rather than subpoenaing them

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from a nonparty witness.” 8A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2204 at 365 (2nd ed.1994) (citing *Bada Co. v. Montgomery Ward & Co.*, 32 F.R.D. 208 (S.D.Cal.1963) and *Overly v. Hall-Neal Furnace Co.*, 12 F.R.D. 112 (N.D.Ohio 1951)). “Although Rule 45 is not limited by its terms to nonparties, it should not be used to obtain pretrial production of documents or things, or inspection of premises, from a party in circumvention of discovery rules or orders. Discovery from a party, as distinct from a nonparty, is governed by Rule 34, not Rule 45.” 7 *Moore's Federal Practice* § 34.02[5][e] (3d ed.) (citing *Hasbro, Inc. v. Serafino*, 168 F.R.D. 99 (D.Mass.1996)).

The parties did not bring any Sixth Circuit case to the Court's attention on this issue, and the Court has found none on point. In *Kean v. Van Dyken*, 2006 WL 374502 (W.D.Mich. Feb.16, 2006), the court denied the plaintiff's request for a subpoena *duces tecum* directed to parties in the action under Rule 45, finding that he should proceed under Rule 34.

Cases from other districts are not in agreement, but the Court does not find them significantly probative for the issue to be decided in this case. The cases stating that a subpoena for the production of documents may be directed to a party under Rule 45 usually rely on *Badman v. Stark*, 139 F.R.D. 601 (M.D.Pa.1991) (“a subpoena under Rule 45 may be served upon both party and non-party witnesses”). However, *Badman* ultimately found that the subpoena should not issue because the discovery “should not be had.” *Id.* at 603. Also, in *Mortgage Information Servs., Inc. v. Kitchens*, 210 F.R.D. 562 (W.D.N.C.2002), the court found that a Rule 45 subpoena could properly be served on a party, but it also cited *Moore's Federal Practice* for the proposition that Rule 45, although not limited by its terms to nonparties, should not be used to obtain pretrial production of documents from a party in circumvention of discovery rules or orders. *Id.* at 566. Moreover, in *Joiner*, a court in the same district as *Kitchens* distinguished it and found that the

use of a subpoena under Rule 45 directed to employees of the corporation to obtain documents belonging to the corporation was not proper.

Accordingly, the Court finds that the majority view is that a party should not be permitted to circumvent the requirements and protections of Rule 34 by proceeding under Rule 45 for the production of documents belonging to a party. As stated earlier, Plaintiff sought these documents in her production requests under Rule 34 made to Defendant in April 2006. Plaintiff argues that Defendant objected to these requests and failed to produce all of them. However, if that is the case Plaintiff should have moved to compel production under Rule 34(b). Plaintiff admitted during oral argument that she did nothing until approximately a week and a half before discovery ended when she sought to depose Crockett and have him produce the documents. Plaintiff served the subpoena on September 21, eight days before discovery was due to close. The deposition date was the last day of discovery, September 29. This effectively shortened the time for producing the documents to eight days from the thirty days allowed under Rule 34(b). Plaintiff will not be allowed to circumvent the procedures in Rule 34 by subpoenaing Crockett under Rule 45. Defendant's motion to quash the subpoena will be granted.

C. Parties' Stipulation

*4 That having been decided, the parties informed the Court at oral argument that they had agreed that Crockett could be deposed by Plaintiff before the end of October and that he would produce 80 pages of documents. The parties disagree on whether Crockett should be under an obligation to produce additional documents should he discover them between now and the time Plaintiff deposes him. The Court construes this agreement as a stipulation pursuant to Fed.R.Civ.P. 29 that Plaintiff will notice Crockett's deposition as it would for a person under Fed.R.Civ.P. 30(b)(5) which allows the notice of deposition to be accompanied by a request under Rule 34 for the production of documents at

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the time of the taking of the deposition. The parties have identified the 80 pages of documents now in Crockett's possession and those are the specific documents that Plaintiff should notice him to produce at his deposition. Because the stipulation was entered on the record at the hearing, the Court finds that this satisfies the rule's requirement that the stipulation be in writing. Due to the above finding that the subpoena should be quashed, the Court will not order that Crockett produce any additional documents. His deposition will be limited to one day. The Court notes that if Crockett's deposition had proceeded on September 29 as Plaintiff originally planned, these 80 pages are all that Plaintiff would have received because they are all that he had identified at that time.

IV. DEFENDANT'S MOTION TO COMPEL

Defendant's next motion is to compel Plaintiff to testify at another deposition about her previous employment at the Bureau, her discharge from employment, and the settlement of her action against the Bureau. Plaintiff left the Bureau in 1994, and Defendant hired her in 1999. Plaintiff stated on her employment application for Defendant that she resigned from the Bureau. Defendant has produced a letter from the Bureau stating that her employment was terminated as of April 19, 1994. The settlement agreement that Plaintiff entered into with the Bureau has not been produced, although Plaintiff's counsel stated at oral argument that she now has a copy of the agreement.

Defendant argues that it is entitled to inquire into the circumstances surrounding Plaintiff's discharge because her employment may have ended by termination rather than resignation, as Plaintiff has testified. Defendant also contends that her legal action against the Bureau and subsequent settlement may show her state of mind in receiving performance-based criticism and the "modus operandi by which she takes those criticisms and churns out unsupported accusations of discrimination." (Docket no. 33 at 3) Plaintiff contends that Defendant has not shown that the information sought is relevant to

the case and therefore discoverable.

A. Relevancy

Under Fed.R.Civ.P. 26(b)(1) parties may obtain discovery regarding any matter not privileged that is relevant to the claim or defense of any party. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1). Plaintiff does not dispute Defendant's argument that if Plaintiff committed resume fraud by falsely stating that she resigned when she was terminated, this would be relevant under the after-acquired evidence doctrine. See *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). In addition, prior frivolous claims of racial discrimination and harassment could be admissible as they might bear on Plaintiff's credibility at trial. *Maxwell v. Health Center of Lake City, Inc.*, 2006 WL 1627020 (M.D.Fla. June 6, 2006). The Court understood Plaintiff's counsel at oral argument to rely upon *Maxwell* in her argument that relevancy is lacking, but the Court finds such reliance misplaced. The court in that case clearly found that such evidence "could be relevant and possibly admissible" at trial. 2006 WL 1627020 at *4. Also, in *Travers v. Travenol Labs., Inc.*, 94 F.R.D. 92 (N.D.Ill.1982), the court compelled the plaintiff in an employment discrimination case to sign a release so that the defendant could obtain documents of a prior EEOC discrimination charge filed by the plaintiff against a prior employer because such information might lead to admissible evidence as to plaintiff's intent and motive in filing the present action. Finally, a circuit court found evidence of prior claims of racial discrimination against two previous employers admissible as impeachment at trial to show bias or motive. *Pounds v. Board of Trustees*, 215 F.3d 1320 (4th Cir.2000) (unpublished). Accordingly, the Court finds that inquiry into Plaintiff's employment at the Bureau, her discharge from employment, and the terms of her settlement agreement are relevant to the present action, and are therefore discoverable.

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B. Confidentiality Agreement

*5 The Court also finds that the existence of the confidentiality agreement is no obstacle to Defendant's inquiry into these matters. Defendant has shown by letters from the Bureau's counsel that the Bureau is willing to waive any right to confidentiality it has under the agreement so long as either Plaintiff waives the confidentiality provisions as applicable to all other parties or she is ordered to give testimony regarding the prior litigation and settlement, and the information disclosed about the prior litigation is kept confidential and under seal in this litigation. Plaintiff's counsel at the hearing noted that Plaintiff had not waived her rights to confidentiality as to her settlement. However, her right must yield to Defendant's right to discover this information in this action which Plaintiff herself initiated. See *Maxwell*, 2006 WL 1627020 at *2 (plaintiff may have waived privacy interests by bringing discrimination action); *Kalinauskas v. Wong*, 151 F.R.D. 363 (D.Nev.1993) (limited deposition of former employee allowed even though settlement agreement would have otherwise barred former employee's discussion of her employment).

IT IS THEREFORE ORDERED that Defendant's Emergency Motion to Quash Subpoena issued to Laurence Crockett and for Protective Order (docket no. 34) be **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff shall notice the deposition of Laurence Crockett in accord with *Fed.R.Civ.P. 30(b) (5)* and the parties' stipulation pursuant to *Rule 29*, for a day prior to November 1, 2006, at which time Mr. Crockett shall appear and produce the 80 pages of documents which the parties have presently identified and agreed upon.

IT IS FURTHER ORDERED that Defendant's Motion to Compel Pursuant to *Rule 37(a)(2)(B)* (docket no. 31) be **GRANTED**.

IT IS FURTHER ORDERED that Defendant shall notice Plaintiff's deposition for a day prior to November 1, 2006, and that Plaintiff shall appear

and testify regarding her employment at the Detroit Metro Convention and Visitors Bureau, her discharge from employment, and the settlement of her suit against the Bureau.

IT IS FURTHER ORDERED that Plaintiff shall designate her deposition testimony as confidential matter subject to the Protective Order previously entered in this action.

Pursuant to *Fed.R.Civ.P. 72(a)*, the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under *28 U.S.C. 636(b)(1)*.

E.D.Mich.,2006.

Stokes v. Xerox Corp.

Slip Copy, 2006 WL 6686584 (E.D.Mich.)

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

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| UNITED STATES OF AMERICA and the | |) | |
| STATE OF MICHIGAN, | |) | |
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| | Plaintiffs, |) | |
| | v. |) | Civil Action No. |
| | |) | 2:10-cv-14155-DPH-MKM |
| | |) | Hon. Denise Page Hood |
| BLUE CROSS BLUE SHIELD OF | |) | Mag. Judge Mona K. Majzoub |
| MICHIGAN, | |) | |
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| | Defendant. |) | |
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**INDEX TO EXHIBITS OF
REPLY BRIEF IN SUPPORT OF PLAINTIFFS' SEALED MOTION TO
COMPEL THE PRODUCTION OF DOCUMENTS RESPONSIVE TO
PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS**

1. E-mail from Ashley Cummings, Hunton & Williams, to Amy Fitzpatrick, U.S. Dept. of Justice (February 15, 2012)
2. Letter from Ashley Cummings, Hunton & Williams, to Amy Fitzpatrick, U.S. Dept. of Justice (February 14, 2012)
3. Letter from Amy Fitzpatrick, U.S. Dept. of Justice to Ashley Cummings, Hunton & Williams (November 16, 2011)
4. Letter from Amy Fitzpatrick, U.S. Dept. of Justice to Ashley Cummings, Hunton & Williams (September 16, 2011)
5. Letter from Amy Fitzpatrick, U.S. Dept. of Justice to Ashley Cummings, Hunton & Williams (March 12, 2012)
6. Letter from Amy Fitzpatrick, U.S. Dept. of Justice to Ashley Cummings, Hunton & Williams (February 27, 2012)
7. Blue Cross Blue Shield of Michigan's Subpoena to Produce Documents Served on United Health Group, Inc. (February 7, 2012)
8. Unpublished Opinions