

**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, a Michigan nonprofit
healthcare corporation,

Defendant.

Civil Action No.

2:10-cv-14155-DPH-MKM

Hon. Denise Page Hood

Mag. Judge Mona K. Majzoub

**PLAINTIFFS THE UNITED STATES AND THE STATE OF MICHIGAN'S REPLY IN
SUPPORT OF ITS MOTION TO COMPEL A RESPONSE TO PLAINTIFFS' FIRST
AND THIRD INTERROGATORIES AND TO COMPEL PRODUCTION OF
DOCUMENTS RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUEST NO. 50**

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Interrogatory No. 1. Blue Cross elaborates upon its supplemental answer to Interrogatory 1 in its opposition brief. Dkt. 207 at 3-11. For example, in response to plaintiffs' observation that Blue Cross relied on the PG5 reimbursement formula in claiming that the MFN lowered rates, Dkt. 188 at 4, Blue Cross argues that its MFN with PG5 hospitals "contributed to lower rates" because "the MFN clause cannot be divorced from the cost-reducing PG5 reimbursement methodology." Dkt. 207 at 5. Therefore, according to Blue Cross's brief (but not its interrogatory answer), "the PG5 MFN is inextricably intertwined with the reimbursement model" and "it is neither possible nor appropriate to separate the MFN from the . . . reimbursement model." Dkt. 207 at 5-6.¹

Had Blue Cross included these statements as part of the sworn Interrogatory answer that the Court compelled, plaintiffs would have understood them to be part of Blue Cross's claimed "extensive factual and economic support for [its] MFNs' procompetitive effects." But Blue Cross has not provided them as part of a complete, sworn interrogatory answer. "If Blue Cross has facts, it should state them." Dkt. 178 at 13. *See Walls v. Paulson*, 250 F.R.D. 48, 52 (D.D.C. 2008) ("interrogatories serve not only as a discovery device but as a means of producing admissible evidence; there is no better example of an admission of a party opponent . . . than an answer to an interrogatory.").

Blue Cross maintains that "much of the factual information that would be responsive to Interrogatory 1 . . . rests with third parties . . .," Dkt. 207 at 3, although it cites third-party

¹ Blue Cross attempts to rationalize its interrogatory answer, Dkt. 207 at 7-8, with the prior investigative deposition testimony of its corporate representative, Kim Sorget, who admitted he was unaware of any case where Blue Cross had obtained lower rates as a result of an MFN clause. Dkt. 100 at 3. This effort is of no moment here. In light of Mr. Sorget's testimony, Plaintiffs propounded Interrogatory 1 and now seek a complete answer precisely to test Blue Cross's later claimed "extensive factual and economic support for [its] MFNs' procompetitive effects." *See id.* at 3-4.

information in its brief. *Id.* at 10. To the contrary, the Interrogatory seeks the “extensive factual and economic support” Blue Cross represented to the Court it *already possessed* in August 2011 (including information obtained from third parties) – as the Court recognized in ordering Blue Cross to answer. Dkt. 178 at 10.

Moreover, Blue Cross’s answer remains deficient in other respects. Its answer claims to rely on “the best research currently available,” without identifying that research. Dkt. 188 at 7. Blue Cross now says that “what [it] meant by this answer” was “analyzing and comparing [hospital] rates.” Dkt. 207 at 8. Contrary to the claim in Blue Cross’s brief that “the results of that analysis were provided,” *id.*, its answer fails to provide either “that analysis” or its results in any identifiable, much less a complete, form.

Blue Cross also still refuses to answer subparts (a) and (b) separately, Dkt. 207 at 5 n.9, and has avoided providing an answer to subpart (a) altogether. Blue Cross’s claim that the objection to its failure “elevates form over substance,” *id.*, at 5 n.9, flouts this Court’s precedent, which appropriately requires answering subparts separately. *See* Dkt. 188 at 5.

Interrogatory No. 3(b) Nowhere does Blue Cross’s response refer to its actual, boilerplate objection to Interrogatory 3(b): that the term “payment” is somehow vague and ambiguous. Indeed, Blue Cross now admits that Interrogatory 3(b) defines “payment” to include rate increases and one-time payments. Dkt. 207 at 12. And Blue Cross’s admission that it agreed to pay rates that were higher than it had previously paid to hospitals that agreed to MFN-plus clauses, Dkt. 207 at 16, is itself an admission of the predicate fact that it provided those hospitals with a “payment.” A review of the factual record confirms that Blue Cross has made several of those payments, at least in part, for an MFN-plus clause. Dkt. 188 at 12.

Nonetheless, Blue Cross contends that its answer that it made no such payments is a complete response. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This redefinition injects limitations on Blue Cross's answer that enable an evasive answer. Blue Cross attempts to obscure these self-imposed limitations by claiming that Plaintiffs have a "mistaken" view of hospital negotiations, in that its increased payments to hospitals cannot be isolated as direct payments for MFN-plus contracts. Dkt. 207 at 12. But Blue Cross's brief merely repeats the error of its answer: both ignore that the interrogatory asks about payments that Blue Cross made "at least in part," rather than (per Blue Cross's limitation) "specifically in exchange for," a hospital's agreement to an MFN-plus clause.²

The evasiveness of Blue Cross's answer is demonstrated by the payment Blue Cross made, at least in part, for an MFN-plus clause [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, a truthful answer to Interrogatory 3(b) would admit that Blue Cross's payment increase [REDACTED]

² Blue Cross's purported examples of testimony showing that it did not pay for an MFN-plus clause fail to support its claim. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Blue Cross further resists answering the Interrogatory by claiming that it did not “pay” any hospitals specifically (per its limitation) for an MFN-plus clause because the reimbursement increases in question would have been granted anyway. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Blue Cross should be ordered to answer Interrogatory 3(b) as written.

Document Request 50 Blue Cross has now abandoned its boilerplate relevance objection.³ Instead, Blue Cross now claims that it “swept [its files] for any documents even remotely related to this litigation.” But Blue Cross’s own supplemental response to Request 50 contradicts this new claim. That response states expressly that Blue Cross searched for and would produce only “all Performance Appraisals and Incentive Compensation Goals that mention or relate to hospital contracting.” Dkt. 207 at 18.

Blue Cross’s Statement of Issues Presented similarly states incorrectly that Blue Cross “has already produced all documents responsive to [Plaintiffs’ Request 50].” Dkt.207 at ii. Blue Cross’s production of only nine documents belies its claim. [REDACTED]

[REDACTED]

³ Document Request 50 requests production of “[a]nnual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion; annual statements of incentives, goals, or objectives; any annual employee performance evaluation, review, or appraisal; or any documents in the nature of the preceding documents” for varying periods for 15 key Blue Cross present or former employees. Dkt.187-5, Ex. 11 at 4–5.

[REDACTED]

[REDACTED] Blue

Cross likely has, but has not produced, responsive documents in each of these four categories for each of the 15 identified executives for each of the years requested.

Though Blue Cross correctly points out that it cannot produce documents it does not have, the declaration of Cathy Goheen confirms that the paucity of documents produced is because of Blue Cross's self-imposed limitations on the documents it was looking for; not that responsive documents do not exist. *See* Dkt. 206-2, Ex. M. Contrary to the declaration's apparent purpose, it establishes that the search and production was limited to documents involving specific subjects of Blue Cross's choosing, while ignoring that Request 50 contains no such limitations. *Id.* at ¶4. Request 50 seeks the types of documents detailed above, without any qualification for subject matter. The declaration also reveals that Blue Cross's constrained search was limited only to personnel files, rather than including a reasonable inquiry of the 15 named individuals who are likely themselves to possess documents that are responsive to Request 50. Finally, Blue Cross suggests that the requested documents would be cumulative or unduly burdensome, but it did not object on either basis, and has not attempted to make such a showing here. *See* Dkt. 185 at 6-7 (sealed).

Respectfully submitted,

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September 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 2:10-cv-14155-DPH-MKM, and I hereby certify that there are no individuals entitled to notice to who are non-ECF participants.

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**INDEX OF EXHIBITS TO PLAINTIFFS' SEALED MOTION TO COMPEL A
RESPONSE TO
PLAINTIFFS' FIRST AND THIRD INTERROGATORIES AND TO COMPEL
PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS'
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1. Email From Eric Kropfreiter, Blue Cross Blue Shield of Michigan, to Doug Darland, Blue Cross Blue Shield of Michigan (April 18, 2008; BLUECROSSMI-99-00981664) (FILED UNDER SEAL)
2. Deposition Transcript of Patrick McGuire, CFO of Ascension Health – St. John Providence Health System (August 14, 2012) (FILED UNDER SEAL)
3. Signature Approval Hospital Agreement in excess of the Standard PHA and TRUST Agreement between Blue Cross Blue Shield of Michigan and Alpena General Hospital (December 22, 2009; BLUECROSSMI-99-658723 in BLUECROSSMI-99-658694) (FILED UNDER SEAL)
4. Email From Doug Darland, Blue Cross Blue Shield of Michigan, to Kevin Lanciotti and Eric Kropfreiter, Blue Cross Blue Shield of Michigan (December 11, 2009; BLUECROSSMI-99-196180) (FILED UNDER SEAL)