

**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

**PLAINTIFF UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR A  
PROTECTIVE ORDER**

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\* Denotes controlling or most appropriate authority for the relief sought.

## INTRODUCTION

Blue Cross's motion filed last night to postpone its employee Jeffrey Connolly's deposition noticed a month ago for August 27, relies wholly on an eleventh-hour emergency of Blue Cross's own making. The basis for this motion is Blue Cross' recently developed dispute with Aetna concerning Blue Cross' ability to review with Mr. Connolly – in advance of the deposition – material produced by Aetna regarding his time as an Aetna employee, which terminated nearly six years ago. Blue Cross argues that because of this dispute, the deposition of Mr. Connolly – the first Blue Cross executive with substantive knowledge to be deposed in this case and whom Blue Cross has been on notice that Plaintiff intends to depose since March – should be postponed until October. The true purpose of the motion is to further delay the proceedings in this case. Accordingly, Blue Cross's motion should be denied.

If there were any doubt about Blue Cross's true motivations, they should be erased by Blue Cross's claim today to Plaintiffs that an unspecified "scheduling conflict" has arisen concerning Plaintiffs' *second* deposition of a Blue Cross executive with substantive knowledge – Terrence Burke – which will ostensibly require that deposition, which was scheduled for August 31 *at Blue Cross' request*, to be rescheduled for October 10. *See* Ex. 1.

Therefore, the United States respectfully requests that the Court not postpone Mr. Connolly's deposition and allow it to proceed as noticed.

### **I. Background**

This motion is not the first time that Blue Cross has resisted scheduling Mr. Connolly's deposition without good cause. On March 7, 2012, Plaintiffs noticed Mr. Connolly's deposition for April 18. Blue Cross thwarted Plaintiffs' repeated attempts to notice Mr. Connolly's deposition during the spring by demanding that the United States agree to unacceptable

conditions. *See* Dkt. # 160, at 7. Blue Cross then obtained a stay of deposition discovery for more than two months to enable the parties to resolve such issues. At no time during the stay did Blue Cross raise any concern regarding Mr. Connolly's deposition as it relates to his time at Aetna. After consulting again with Blue Cross in July about a mutually agreeable date, the United States noticed Mr. Connolly's deposition for August 27 – a date that Blue Cross agreed to – and served its deposition notice on July 26. *See* Ex.2. Blue Cross's motion omits that date while misleadingly suggesting that the deposition was recently noticed. *See* Dkt. #194, at 5.

Contrary to the suggestion in Blue Cross's motion (Dkt. # 194, at 6), on August 16, counsel for Blue Cross then reported to counsel for the United States that, although Aetna and Blue Cross needed to resolve an unspecified issue, Blue Cross expected Mr. Connolly's deposition to go forward on August 27. Two days ago, however, Blue Cross requested that the United States agree to postpone Mr. Connolly's deposition until October because Blue Cross has a dispute with Aetna concerning Blue Cross's ability to review material produced by Aetna with Mr. Connolly regarding his time as an Aetna employee, which terminated in 2006. After consideration, the United States rejected Blue Cross's request, stating that Blue Cross's dispute with Aetna should not prevent Mr. Connolly from testifying at the deposition about all relevant issues without prejudice to Blue Cross. *See* Ex. 3. Viewing Blue Cross's dispute with Aetna to be an emergency of Blue Cross's own making, the United States' response also made clear that, in the absence of a court order postponing Mr. Connolly's deposition, it intends to proceed with Mr. Connolly's deposition on August 27.<sup>1</sup> *Id.*

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<sup>1</sup> Toward the end of a meet-and-confer discussion yesterday between Aetna and Blue Cross, which the United States became aware of through Aetna, the United States suggested that the deposition proceed to cover, at minimum, Mr. Connolly's time at Blue Cross, which is the focus of the questioning in this enforcement action, and that, if Blue Cross and Aetna are unable to resolve their dispute concerning Mr. Connolly's long-ago time at Aetna, then they could seek the

Blue Cross responded today by stating that it will not make Mr. Connolly available for his deposition on August 27 because it has merely *filed* its motion for a Protective Order. *See* Ex. 4. In effect, Blue Cross has already granted itself the relief it seeks from the Court.

## **II. Argument**

### **A. Blue Cross has failed to demonstrate good cause**

“To show good cause, a movant for a protective order must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements.” *Nix v. Sword*, 11 Fed. App’x 498, 500 (6th Cir. 2001). Blue Cross cannot do so here. Its claim that Plaintiffs are trying to keep it from discovering information is baseless. Blue Cross has all of Aetna’s information and is free, subject to complying with the terms of the protective orders, to use that information in asking Mr. Connolly any question it would like to ask him at his deposition about his tenure at Aetna. Plaintiffs will also extend the seven-hour limit to allow Blue Cross to ask all of its questions. If Blue Cross thinks it needs to take its own deposition of Mr. Connolly concerning his time at Aetna more than half-a-decade ago, it is free to notice his deposition.

Blue Cross’s motion, which is reliant wholly on an eleventh-hour emergency of Blue Cross’s own making, fails to demonstrate the requisite “clearly defined and serious injury” that would result if the deposition proceeds as validly noticed on August 27. Blue Cross will have the same ability as any other party to ask Mr. Connolly any questions concerning his tenure at Aetna, which ended in 2006, and has essentially no substantive relevance to the government’s

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Court’s resolution of their dispute and ultimately convene a supplemental session of Mr. Connolly’s deposition. Rather than agree to this compromise approach, which would enable Mr. Connolly’s long-scheduled deposition to proceed, Blue Cross insisted that its dispute with Aetna first be resolved and filed this motion.

enforcement action. Further, Aetna has agreed that Mr. Connolly is free to testify at his deposition about any non-privileged matters that otherwise are protected by his post-employment non-disclosure agreement, and Blue Cross is free to inquire about those matters at Mr. Connolly's deposition. Finally, Blue Cross's motion also ignores the prejudice that would result to plaintiffs if Mr. Connolly's deposition is postponed until October as Blue Cross demands. There remain many other depositions, including many other depositions of Blue Cross employees, to be taken in September, October, and November to meet the Court's fact-discovery deadline of November 30, 2012. *See* Dkt. # 176.

**B. Absent a Court order, Mr. Connolly and Blue Cross are obligated to appear for his deposition, as noticed, on August 27**

Blue Cross sent Plaintiffs an email this morning that states “[f]or the reasons set forth in [its] motion, Mr. Connolly will not appear for deposition on August 27, 2012 absent Court resolution of the issue.” *See* Ex. #4. Blue Cross's stated position is contrary to both law and common sense. In a pleading that Blue Cross filed in this case in April 2011, Blue Cross itself recognized that “[a] protective order should generally be secured *prior to the date of a deposition.*” Dkt. # 43, Brief at 7 (citing 8A Charles Alan Wright, et al., *Federal Practice & Procedure* § 2035 (3d ed. 2010) (emphasis in Blue Cross's brief).

Blue Cross's 2011 brief also recognizes cases that apply that rule. *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979) (filing motion for protective order does not relieve party's “duty to appear for [] deposition”); *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 913 (11th Cir. 2010) (same); *In re Toys R Us-Delaware, Inc. Fair and Accurate Credit Transactions Act*, 2010 WL 4942645 (C.D. Cal. July 29, 2010) (“Unless a party or witness files a motion for a protective order and seeks and obtains a stay *prior to the deposition*, a party or witness has no basis to refuse to attend a properly noticed deposition”) (emphasis in original);

*see also Koninlike Philips Elec. N.V. v. KXD Tech., Inc.*, 2007 WL 3101248, at \*18 (D. Nev. 2007) (“Absent a protective order or an order staying the deposition, the party, including its officers or Rule 30(b)(6) deponents is required to appear for a properly noticed deposition.”).<sup>2</sup>

Although Plaintiff has asked Blue Cross for legal support for its stated refusal to have its employee Mr. Connolly appear at the deposition, it has supplied none that undercuts the cases to the contrary that Blue Cross itself has previously cited to the Court. These cases require a judicial order to delay a validly noticed deposition because otherwise a party’s filing of a motion to delay the deposition would be self-executing and supplant the role of the judiciary. Nothing in the federal rules contemplates, let alone supports, Blue Cross’s position here. *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964) (“Counsel’s view seems to be that a party need not appear if a motion under [now Rule 26(c)] is on file, even though it has not been acted upon. . . . [Rule 26(c)] places the burden on the proposed deponent to get an order, not just to make a motion.”). Indeed, “the filing of a motion under Rule 26(c) is not self-executing – the relief authorized under that rule depends on obtaining the court’s order to that effect.” Fed. R. Civ. P. 37(d) Advisory Committee’s Note (relief from discovery requests “depends on obtaining a court order to that effect”).

### CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court reject Blue Cross’ delay tactics and deny Blue Cross’s eleventh-hour motion to postpone Jeffrey Connolly’s deposition.

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<sup>2</sup> Fed. R. Civ. P. 37(d) is not to the contrary. Although that Rule does not allow for sanctions when a party fails to attend a deposition when it has a pending motion for a protective order, “[r]ule 37 is not the only available vehicle for sanctions and [a court may] use [its] inherent authority to control discovery to sanction a party for filing a frivolous motion for a protective order solely to avoid attending a deposition.” *Amobi v. District of Columbia Dep’t of Corrections*, 257 F.R.D. 8, 10-11 (D.D.C. 2009).

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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By:  
/s/ David Z. Gringer  
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August 23, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on August 23, 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.

/s/ David Z. Gringer  
Trial Attorney  
Litigation I Section  
Antitrust Division  
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Washington, D.C. 20530  
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david.gringer@usdoj.gov

# EXHIBIT 1

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**From:** Gringer, David  
**Sent:** Thursday, August 23, 2012 12:51 PM  
**To:** 'Lasken, Jonathan H.'; [dmatheson@gibsondunn.com](mailto:dmatheson@gibsondunn.com)  
**Subject:** RE: Burke Deposition

Jonathan:

What is the nature of the conflict? Why can the deposition not take place closer to the date it was noticed?

Thanks,

David

---

**From:** Lasken, Jonathan H. [<mailto:JLasken@hunton.com>]  
**Sent:** Thursday, August 23, 2012 12:39 PM  
**To:** Gringer, David; [dmatheson@gibsondunn.com](mailto:dmatheson@gibsondunn.com)  
**Subject:** Burke Deposition

David and Dan,

A scheduling conflict has arisen with respect to Terry Burke's deposition. We need to reschedule the deposition for October 10.

Best,  
Jonathan

[Home](#) [VCard](#) [Bio](#)

	<b>Jonathan Lasken</b> Associate <a href="mailto:JLasken@hunton.com">JLasken@hunton.com</a>
	Hunton & Williams LLP 2200 Pennsylvania Avenue, N.W. Washington, DC 20037 Phone: (202) 955-1983 Fax: (202) 778-7474

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# EXHIBIT 2

**From:** Gringer, David  
**Sent:** Thursday, July 26, 2012 6:25 PM  
**To:** 'Todd M. Stenerson'  
**Cc:** 'Beach, Jason'; 'Boone, Meghan'; 'Bruce Hoffman'; 'caf@millerlawpc.com'; 'CFitzgerald@gibsondunn.com'; Danks, Ryan; 'DGustafson@gustafsongluek.com'; 'DHedlund@gustafsongluek.com'; 'DMatheson@gibsondunn.com'; 'DSmall@cohenmilstein.com'; 'eahrens@gustafsongluek.com'; 'Epm@millerlawPC.com'; Fitzpatrick, Amy; Gringer, David; 'jef@millerlawpc.com'; 'jlipton@gibsondunn.com'; 'John Tangren'; 'Jonathan H. Lasken'; Joyce, Barry; Kramer, Steven; 'Landes, Beth'; Liebeskind, Richard L; 'lippitte@michigan.gov'; 'markst@michigan.gov'; 'Martin, Jack'; 'Mary Jane Fait'; 'Michelle L. Alamo'; 'Neil Gilman'; 'rcacace@cohenmilstein.com'; 'SAWilson@gibsondunn.com'; 'vlewis@gibsondunn.com'  
**Subject:** deposition notices-Connolly/Kropfreiter/Rossi/Schwartz  
**Attachments:** Connolly-BCBSM Depo Notice.pdf; Kropfreiter-BCBSM Depo Notice.pdf; Rossi-BCBSM Depo Notice.pdf; Schwartz-BCBSM Depo Notice.pdf

**Counsel:**

Please see the attached.

Best,

David

David Gringer  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
(202) 532-4537  
[david.gringer@usdoj.gov](mailto:david.gringer@usdoj.gov)



# EXHIBIT 3

---

**From:** Danks, Ryan  
**Sent:** Wednesday, August 22, 2012 12:39 PM  
**To:** 'Lasken, Jonathan H.'  
**Subject:** RE: Revised deposition notices -- Connolly and Johnson

Jonathan:

Thank you for your email. We understand that a call has been scheduled for 3:30pm today to attempt to resolve your dispute with Aetna regarding Mr. Connolly's non-disclosure agreement. In any event, the existence of the dispute between Blue Cross and Aetna should not prevent Mr. Connolly from testifying at the deposition about all relevant issues without prejudice to Blue Cross. Thus there is no good cause to delay Mr. Connolly's deposition, which was scheduled weeks ago for August 27 in consultation with Blue Cross. If Blue Cross disagrees, then it is free to seek relief from the court.

I would also like to address two other issues raised in your email. First, to your broader point about cooperation in deposition scheduling: the United States has been, and continues to be, willing to work with Blue Cross to schedule dates for party and non-party depositions to attempt to minimize the inconvenience for all concerned. But, as I told you in our phone call, Blue Cross appears to have mistaken our willingness to work cooperatively on these issues with a concession on our part that Blue Cross's response to these discovery requests is voluntary. It is not, and Blue Cross's request to delay Mr. Connolly's deposition for five weeks is unreasonable.

In particular, our efforts to cooperate do not warrant linking Mr. Connolly's deposition to Mr. Johnson's. Plaintiffs noticed Mr. Johnson's deposition for September 5, but have chosen to re-notice it for October 25 because of the technical issues with Beaumont's electronic document production. If there is another date near October 25 that is more convenient for Mr. Johnson, then please let us know, and we will consider issuing a revised notice, as we have done in the past.

The second issue I would like to address is your characterization of my comments during our phone conversation, which you have wrenched out of context. I stated that your attempt to link the Connolly and Johnson deposition dates was unreasonable, while drawing a contrast to your simply asking us to consider rescheduling the Connolly deposition in light of Blue Cross's dispute with Aetna. Upon consideration of that request, with the benefit of additional information about the dispute, and in light of Blue Cross's unwillingness to produce Mr. Connolly anytime before October 1, we have concluded that your request to delay Mr. Connolly's deposition is not reasonable and therefore we must decline it.

We intend to proceed with Mr. Connolly's deposition as re-noticed yesterday (concerning a new location) absent a court order. Please let me know if you have any questions.

Ryan

---

**From:** Lasken, Jonathan H. [mailto:JLasken@hunton.com]  
**Sent:** Tuesday, August 21, 2012 8:01 PM

**To:** Danks, Ryan

**Subject:** RE: Revised deposition notices -- Connolly and Johnson

Ryan,

As I told you on the phone, we cannot proceed with Jeff Connolly's deposition date without resolving the issue with Aetna regarding Jeff Connolly's non-disclosure agreement. I therefore requested that you agree with us to postpone Jeff Connolly's deposition so that we could resolve this issue. You agreed that my request was reasonable. It is now apparent that the non-disclosure agreement issue will not be resolved by 8/27 and we therefore cannot move forward with this deposition date. I restate my request that you adjourn the deposition to a later date. If you will not do so, we will be forced to move for a protective order.

We note, in this regard, that we are not seeking to avoid producing Jeff Connolly. As I told you, we will produce him at the next date when he is available, which is October 1—a date that, we hope, will provide sufficient time to resolve this issue. You have not explained any reason why that date, which is well before the end of discovery, is not a sufficient date for his deposition.

When scheduling depositions it has been our goal to work with the Plaintiffs in good faith to reach agreement on workable deposition dates for all parties. For this reason, I called you to discuss accommodating your request to postpone Mark Johnson's deposition, if you would work with us to find a later date for Jeff Connolly. If you are still interested in working together to reach friendly agreement on dates for Johnson and Connolly, we are happy to work with you. But at this time we do not accept either date.

Best,

Jonathan

---

**From:** Danks, Ryan [<mailto:Ryan.Danks@usdoj.gov>]

**Sent:** Tuesday, August 21, 2012 3:08 PM

**To:** Stenerson, Todd M.

**Cc:** Beach, Jason; Bell, Theo; Boone, Meghan; Hoffman, Bruce; [caf@millerlawpc.com](mailto:caf@millerlawpc.com); [CFitzgerald@gibsondunn.com](mailto:CFitzgerald@gibsondunn.com); [DGustafson@gustafsongluek.com](mailto:DGustafson@gustafsongluek.com); [DHedlund@gustafsongluek.com](mailto:DHedlund@gustafsongluek.com); [DMatheson@gibsondunn.com](mailto:DMatheson@gibsondunn.com); [DSmall@cohenmilstein.com](mailto:DSmall@cohenmilstein.com); [eahrens@gustafsongluek.com](mailto:eahrens@gustafsongluek.com); [Epm@millerlawPC.com](mailto:Epm@millerlawPC.com); Fitzpatrick, Amy; [jef@millerlawpc.com](mailto:jef@millerlawpc.com); [jlipton@gibsondunn.com](mailto:jlipton@gibsondunn.com); John Tangren; Lasken, Jonathan H.; Joyce, Barry; Kramer, Steven; Landes, Beth; Liebeskind, Richard L; [lippitte@michigan.gov](mailto:lippitte@michigan.gov); [markst@michigan.gov](mailto:markst@michigan.gov); Martin, Jack; Mary Jane Fait; Michelle L. Alamo; Gilman, Neil; [rcacace@cohenmilstein.com](mailto:rcacace@cohenmilstein.com); [SAWilson@gibsondunn.com](mailto:SAWilson@gibsondunn.com); [vlewis@gibsondunn.com](mailto:vlewis@gibsondunn.com); Gringer, David

**Subject:** Revised deposition notices -- Connolly and Johnson

All:

Please see the revised deposition notices for Messrs. Connolly and Johnson. The location of Mr. Connolly's deposition has been changed (but it remains set for Traverse City on August 27). The date of Mr. Johnson's deposition has been changed to October 25.

best  
Ryan

UNITED STATES DEPARTMENT OF JUSTICE

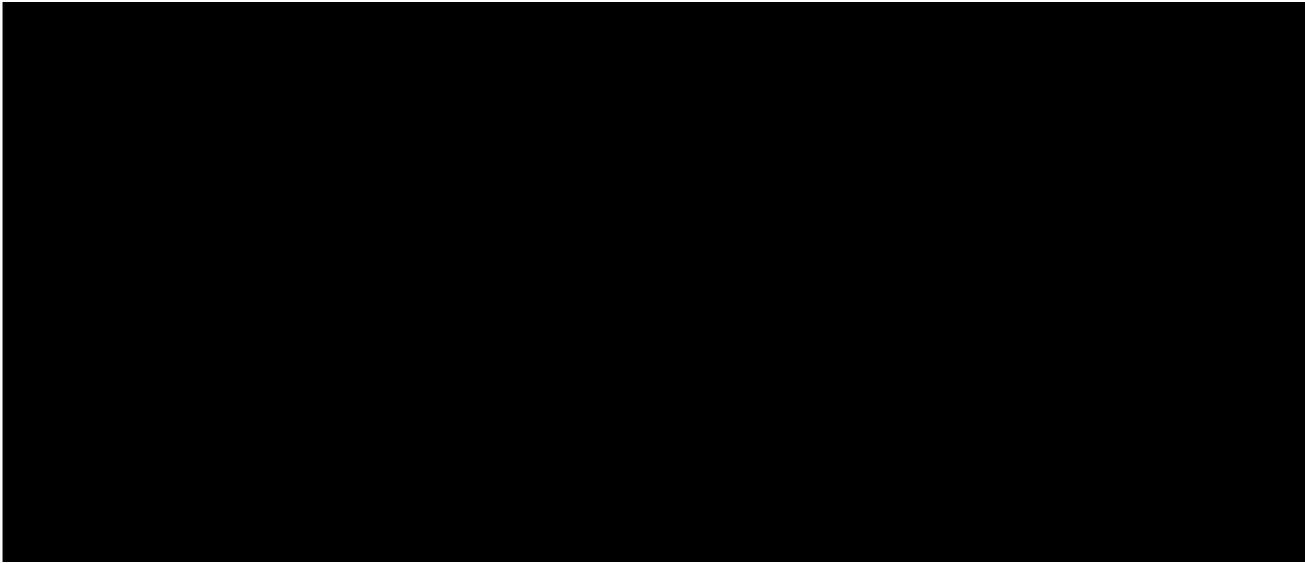
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E-mail: [ryan.danks@usdoj.gov](mailto:ryan.danks@usdoj.gov)

# EXHIBIT 4



---

**From:** Davis, Brenda [<mailto:bdavis@hunton.com>]  
**Sent:** Thursday, August 23, 2012 11:29 AM  
**To:** Fitzpatrick, Amy; Joyce, Barry; Kramer, Steven; Gringer, David; [lippitte@michigan.gov](mailto:lippitte@michigan.gov); [markst@michigan.gov](mailto:markst@michigan.gov); [fait@whafh.com](mailto:fait@whafh.com); [tangren@whafh.com](mailto:tangren@whafh.com); [DSmall@cohenmilstein.com](mailto:DSmall@cohenmilstein.com); [rcacace@cohenmilstein.com](mailto:rcacace@cohenmilstein.com); [DGustafson@gustafsongluek.com](mailto:DGustafson@gustafsongluek.com); [DHedlund@gustafsongluek.com](mailto:DHedlund@gustafsongluek.com); [eahrens@gustafsongluek.com](mailto:eahrens@gustafsongluek.com); [epm@millerlawpc.com](mailto:epm@millerlawpc.com); [jef@millerlawpc.com](mailto:jef@millerlawpc.com); [caf@millerlawpc.com](mailto:caf@millerlawpc.com); [JThompson@sommerspc.com](mailto:JThompson@sommerspc.com); [LYoung@sommerspc.com](mailto:LYoung@sommerspc.com); [vlewis@gibsondunn.com](mailto:vlewis@gibsondunn.com); [jlipton@gibsondunn.com](mailto:jlipton@gibsondunn.com); [SAWilson@gibsondunn.com](mailto:SAWilson@gibsondunn.com); [DMatheson@gibsondunn.com](mailto:DMatheson@gibsondunn.com); [CFitzgerald@gibsondunn.com](mailto:CFitzgerald@gibsondunn.com); [tbell@whafh.com](mailto:tbell@whafh.com); [landes@whafh.com](mailto:landes@whafh.com)  
**Cc:** Cummings, Ashley; Stenerson, Todd M.; Hoffman, Bruce; Gilman, Neil; Martin, Jack; Beach, Jason; [aharris@bodmanlaw.com](mailto:aharris@bodmanlaw.com); [crashid@bodmanlaw.com](mailto:crashid@bodmanlaw.com); Jason R Gourley; Lasken, Jonathan H.  
**Subject:** BCBSM - Connolly Deposition  
**Importance:** High

**This message is being sent on behalf of Ashley Cummings:**

Dear Counsel:

Yesterday, Blue Cross filed a Motion For Protective Order. For the reasons set forth in that motion, Mr. Connolly will not appear for deposition on August 27, 2012 absent Court resolution of the issue.

Sincerely,

Ashley Cummings  
(404) 888-4223

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**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  
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Mag. Judge Mona K. Majzoub

**INDEX OF EXHIBITS TO PLAINTIFF UNITED STATES' RESPONSE TO  
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1. Email from David Gringer, U.S. Department of Justice, to Jonathan Lasken, Hunton & Williams (August 23, 2012)
2. U.S. Department of Justice Deposition Notice of Jeffrey Connolly (scheduled for August 27, 2012 and noticed to Blue Cross Blue Shield of Michigan on July 26, 2012).
3. Email from Ryan Danks, U.S. Department of Justice, to Jonathan Lasken, Hunton and Williams (August 22, 2012).
4. Email from Ashley Cummings, Hunton and Williams to David Gringer, U.S. Department of Justice (August 23, 2012).