

**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

**REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS
RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUEST NO. 51**

TABLE OF AUTHORITIES

Cases

**Hansen Beverage Co. v. Innovation Venture, LLC*, No. 09-50630, 2009 WL 2351769,
(E.D. Mich. July 29, 2009).....1, 4-5
Hurst v. Conopco, Inc., 264 F.R.D. 30 (D. Conn. 2010).....1

Rules

*Fed. R. Civ. P. 26(b).....2

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

Plaintiffs' Document Request 51 seeks documents constituting communications between Blue Cross (and its lawyers) and non-parties relating to this case, related cases, and related investigations. Mischaracterizing applicable case law, Blue Cross argues that Plaintiffs' request is not relevant and is unduly burdensome. Blue Cross also asks the Court to disregard that Blue Cross itself has subpoenaed approximately 145 non-parties for documents on the *same subjects* that are communications between Plaintiffs and non-parties. *See* Doc. #182 at 6–7, Doc. #182-4 at App. A. Blue Cross's conduct contradicts its opposition to Plaintiffs' motion.

1. Blue Cross fails to show that the documents sought by Plaintiffs are irrelevant.

Blue Cross incorrectly claims that “[t]he burden of demonstrating requested discovery is relevant falls on the requesting party.” Doc. #183 at 4. But the case it cites—*Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 09–50630, 2009 WL 2351769 (E.D. Mich. July 29, 2009)—holds nearly the opposite, stating that even a “nonparty seeking to quash a subpoena bears the burden of demonstrating that the discovery sought should not be permitted.” *Id.* at *1; *see also Hurst v. Conopco, Inc.*, 264 F.R.D. 30, 31 (D. Conn. 2010) (“objecting party bears the burden of demonstrating specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant”).

Blue Cross fails to meet its burden of showing that the documents sought by Request 51 are not relevant. In fact, Blue Cross's request for this same discovery from non-parties demonstrates that Blue Cross itself considers the documents to be relevant. *See* Doc. #182 at 6–7, Doc. #182-4 at App. A. Blue Cross also acknowledges the relevance of these documents when it suggests that Plaintiffs should ask non-parties about their communications with Blue Cross or its counsel in depositions. Doc. #183 at 8. Just as this information is relevant in a deposition, so too are documents on the same subject. Moreover, for the purpose of probing bias and credibility, the

requested documentary communications between Blue Cross and non-parties—many of whom may be called as witnesses by Blue Cross—will likely be a far better source of information than simply asking questions without the documents. Unaided by documents, witnesses may not have a clear recollection of such communications.¹

Blue Cross improperly seeks to limit discovery to “facts” that support or contradict claims and defenses. *See id.* But Rule 26 permits discovery “regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . [and] appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b). The documents Plaintiffs seek—documents that are the actual communications between Blue Cross and non-parties about the MFN lawsuits or investigations or that were otherwise made in connection with the MFN lawsuits or investigations—meet that standard.

Confronted with the obvious relevance of two emails between non-party St. Catherine Hospital and Blue Cross’s outside counsel, in which St. Catherine states that it “does not compete for business in Michigan,” *see* Doc. #182 at 7–8, Doc. #182-07 at Exs. 4–5, Blue Cross now claims that it has already agreed to produce all “[d]ocuments reflecting communications with third parties regarding those third parties’ objections to document subpoenas,” including the St. Catherine emails. *See* Doc. #183 at 3. To the contrary, Blue Cross told Plaintiffs that it would limit its production to documents that memorialize a subpoena modification. *See* Doc. #182-04 at 1.² And Blue Cross did not produce the St. Catherine emails to Plaintiffs—they came to

¹ Blue Cross also ignores that precluding discovery of Blue Cross’s documentary communications with non-parties would exclude from discovery those communications with non-parties that are not deposed or subpoenaed.

² The Case-Management Order already obligates Blue Cross to produce documents that reflect its agreed modifications to non-party subpoenas. Doc #177 at ¶ 4.c.

Plaintiffs' attention only because Blue Cross attached them to a motion Blue Cross filed in an Indiana court seeking to compel St. Catherine to produce its documentary communications with Plaintiffs "regarding this litigation or MFNs generally." *See* Doc. #182 at 7–8; Doc. #182–07 at 6, Ex. 3 (Request 19). Nor has Blue Cross produced any other communications between its counsel and non-parties.

Finally, Blue Cross implies that because Blue Cross has sought from Plaintiffs only *pre*-Complaint communications between Plaintiffs and non-parties,³ its own *post*-Complaint communications are not relevant. *See* Doc. #183 at 7–8. Again, Blue Cross's subpoenas to approximately 145 non-parties demanding documents constituting both pre- and post-Complaint communications between Plaintiffs and non-parties on the same subjects as those sought by Request 51 confirms the relevance of both the pre- and post-Complaint documents sought by Request 51.

2. Blue Cross has failed to show that Request 51 is unduly burdensome.

To support its claim of undue burden, Blue Cross exaggerates the difficulty of complying with Request 51. For example, Blue Cross mischaracterizes Request 51 as requiring a "wholesale sweep of every one of its thousands of employees and agents and its inside and outside legal counsel." Doc. #183 at 3. To the contrary, Request 51 requires that Blue Cross search primarily the correspondence files of its inside and outside counsel for responsive documents. Request 51 does not seek the purely internal communications of Blue Cross or its counsel, and both inside and outside counsel should have correspondence files in which their written correspondence with non-parties should be easily located.

³ Plaintiffs have produced all of these pre-Complaint documents to Blue Cross. As Blue Cross admits, it has not served Plaintiffs with a request for post-Complaint communications with non-party insurers. *See* Doc. #183 at 7, n.23.

In addition to counsel's files, Blue Cross need search the relevant files of only the few Blue Cross employees—likely already known to counsel—responsible for communicating with non-parties about the MFN lawsuits or investigations.⁴ Compliance with Request 51 likely will not require additional searches of a previously identified email custodian unless that custodian is responsible for communicating with non-parties about the MFN lawsuits or investigations. In addition, Blue Cross's Objections to Request 51 asserted a burden objection to the search only of counsel's files. *See* Doc. #182-3 at 2–3. Blue Cross did not make a burden objection to the search and production of other responsive documents and that argument is therefore waived. Indeed, Blue Cross's only specifically stated burden objection to searching its counsel's files ignores that its own document request for Plaintiffs' pre-Complaint communications with non-parties required Plaintiffs to search their counsel's files.

Blue Cross also complains that Plaintiffs have sought expedited production of the requested documents. *See* Doc. #183 at 3. However, Blue Cross has already had three months to produce the documents. And Plaintiffs have requested expedited consideration of this issue by the Court so that they can use the responsive documents in depositions, which resumed August 1 and will conclude November 30. Doc. ##175, 176.⁵

⁴ Plaintiffs have been willing to discuss reasonable custodial limitations. When Blue Cross asked Plaintiffs in a meet and confer which Blue Cross employees files it should search, Plaintiffs suggested Blue Cross's public-relations staff, which is charged with making public statements for Blue Cross, and Blue Cross employees assigned to communicate with non-parties about the lawsuits and investigations. Rather than working with Plaintiffs to identify relevant custodians, Blue Cross now mischaracterizes Plaintiffs' efforts as extending the scope of the request. *See* Doc. #183 at 2–3.

⁵ Blue Cross also implies that Request 51 is an eleventh-hour request for documents made only when Blue Cross neared completion of its email review. *See* Doc. # 183 at 2. In fact, Blue Cross has been on notice for a year that Plaintiffs are seeking many of these documents. *See* Doc. #182 at 3, n.3.

Finally, Blue Cross argues that Plaintiffs can “serve subpoenas on third parties seeking information related to their communications with Blue Cross employees and its counsel.” Doc. #183 at 5. It is clearly less burdensome for Blue Cross to produce this discovery than multiple third parties. In fact, *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 09-50630, 2009 WL 2351769 (E.D. Mich. July 29, 2009), a case that Blue Cross relies on, *see* Doc. #183 at 4, supports seeking these materials from Blue Cross. In *Hansen Beverage*, the court quashed a subpoena to a non-party that sought communications between the non-party and the plaintiff’s attorney because the “requests are obtainable from Plaintiff in a more direct, less burdensome, and more convenient fashion . . . [and] are more appropriately pursued through Plaintiff rather than [the non-party]”). *Id.* at *1. Here, in contrast to the subpoenaing party in *Hansen Beverage*, Plaintiffs have pursued the more appropriate, less burdensome course of obtaining documents from Blue Cross instead of shifting the responsibility for production to non-parties.

Conclusion

Plaintiffs respectfully request that the Court grant Plaintiff’s Motion and order the production of documents responsive to Request 51 on a schedule that will enable Plaintiffs to use them in depositions, which resumed August 1 and will conclude November 30. Doc. #175, 176.

Respectfully submitted,

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August 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the date listed above, 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 who are non-ECF participants.

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