

**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' MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUEST 51**

For the reasons stated in the accompanying brief, Plaintiffs, the United States of America and the State of Michigan, respectfully submit this motion, pursuant to Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure, for an order compelling Defendant Blue Cross Blue Shield of Michigan to produce documents responsive to Request 51 of Plaintiffs' Sixth Request for Production of Documents to Blue Cross Blue Shield of Michigan ("Plaintiffs' Sixth Request"). Plaintiffs' Sixth Request was served May 1, 2012, with the goal that responsive documents would be produced in time for use in party depositions. Depositions resume August 1 and will conclude November 30. (Doc. # 175, 176). Plaintiffs therefore seek the Court's consideration of this Motion to expedite discovery in this case.

In compliance with Local Rule 7.1, attorneys for the Plaintiffs have conferred in good faith with attorneys for Blue Cross regarding the nature of this Motion and its legal basis after attempting in prior conversations to resolve Blue Cross's objections. However, the parties are at an impasse.

Respectfully submitted,

By:

/s/ David Z. Gringer

Antitrust Division  
United States Department of Justice  
450 5th Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 532-4537  
david.gringer@usdoj.gov  
*Attorney for the United States*

/s/ with the consent of M. Elizabeth Lippitt

M. Elizabeth Lippitt (P-70373)  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
lippitte@michigan.gov  
*Attorney for the State of Michigan*

July 5, 2012

**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

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

**TABLE OF CONTENTS**

STATEMENT OF ISSUE PRESENTED..... iii  
TABLE OF AUTHORITIES ..... iv  
INTRODUCTION ..... 1  
BACKGROUND ..... 2  
ARGUMENT ..... 4  
    I. The documents that Request 51 seeks are reasonably calculated to lead to the discovery of  
        admissible evidence concerning important issues in this case..... 5  
    II. The documents that Request 51 seeks are reasonably calculated to lead to the discovery of  
        admissible evidence by providing information regarding the credibility of potential  
        witnesses. .... 9  
CONCLUSION..... 12

**STATEMENT OF ISSUE PRESENTED**

Whether Blue Cross is entitled to withhold documents constituting communications between Blue Cross and non-parties relating to this case, related cases, and investigations into Blue Cross's use of most-favored-nation (MFN) clauses in contracts with Michigan hospitals, based on the claim that the documents are not relevant, even though Blue Cross's own discovery has repeatedly sought communications between Plaintiffs and non-parties on these same subjects?

**TABLE OF AUTHORITIES**

**Cases**

*Hickman v. Taylor*  
 329 U.S. 495 (1947)..... 9

*In re Columbia/HCA Healthcare Billing Practices*  
 293 F.3d 289 (6th Cir. 2002) ..... 11

*In re Grand Jury Proceedings*  
 616 F.3d 1172 (10th Cir. 2010) ..... 11

\**Kormos v. Sportsstuff, Inc.*  
 2007 WL 2571969 (E.D. Mich. Sept. 4, 2007)..... 4

*Masi v. DTE Energy Co.*  
 2007 WL 2004914 (E.D. Mich. July 10, 2007) ..... 11

*PML N. Am., L.L.C. v. World Wide Personnel Servs. of Va., Inc.*  
 2008 WL 1809133 (E.D. Mich. Apr. 21, 2008)..... 10

\**SEC v. Gupta*  
 --- F. Supp. 2d ---- (S.D.N.Y. Mar. 26, 2012)..... 9, 10

\**United States v. City of Torrance*  
 164 F.R.D. 493 (C.D. Cal. 1995) ..... 8, 10

\**United States v. IBM Corp.*  
 66 F.R.D. 215 (S.D.N.Y. 1974) ..... 9, 10

\**White Mule Co. v. ATC Leasing Co.*  
 2008 WL 2680273 (N.D. Ohio June 25, 2008)..... 5, 6

**Statutes**

15 U.S.C. § 1..... 2

**Other Authorities**

Charles Allen Wright & Arthur R. Miller  
*Federal Practice and Procedure* (3d ed. 2012) ..... 9

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

## INTRODUCTION

Pursuant to Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure, the United States of America and the State of Michigan (“Plaintiffs”), move to compel Defendant Blue Cross Blue Shield of Michigan (“Blue Cross”) to produce documents responsive to Request 51 of Plaintiffs’ Sixth Request for Production of Documents from Blue Cross Blue Shield of Michigan (“Plaintiffs’ Sixth Request”).<sup>1</sup> Request 51 seeks documents constituting communications that Blue Cross and its counsel have had with non-parties relating to (1) this case or related cases and investigations about Blue Cross’s use of most-favored-nation (MFN) provisions in its contracts with Michigan hospitals; and (2) the prior federal and state investigations into Blue Cross’s proposed and abandoned acquisition of Physician’s Health Plan of Mid-Michigan.<sup>2</sup> Blue Cross objects to Request 51, principally on the ground that it seeks documents that are not relevant.

The documents sought by Request 51—communications that Blue Cross and its counsel have had with non-parties concerning this litigation and related matters—are reasonably calculated to lead to the discovery of admissible evidence on issues that are central to the case and may be particularly useful for the purposes of impeachment and other credibility testing. Moreover, Blue Cross’s own discovery undermines its objection to Plaintiffs’ request. Blue Cross itself has sought to discover documents constituting communications between Plaintiffs and non-parties on the same subjects as those sought in Request 51. Blue Cross has sought such

---

<sup>1</sup> Aetna Inc., plaintiff in the lawsuit *Aetna Inc. v. Blue Cross Blue Shield of Michigan*, 2:11-cv-15346-DPH-MKM, and the plaintiff class in the lawsuit *Steele v. Blue Cross Blue Shield of Michigan*, 2:11-cv-10375-DPH-VMM, although not formally participating in this motion, concur with its contents.

<sup>2</sup> The earlier investigation focused on competition among health plans in the Lansing area—a relevant geographic market in this case—and uncovered Blue Cross’s use of MFN clauses.

documents from Plaintiffs and from nearly all of the roughly 145 non-parties that Blue Cross has subpoenaed for documents. Blue Cross has also asked many deponents to describe all communications that they have had with Plaintiffs. Blue Cross, however, appears to apply a different, more restrictive interpretation of relevance to the scope of Plaintiffs' discovery seeking Blue Cross's communications about this litigation with non-parties than it applies to its own discovery.

### **BACKGROUND**

On October 18, 2010, Plaintiffs filed this action against Blue Cross, alleging that its use of MFN provisions in contracts with various Michigan hospitals constituted an unreasonable restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1. On May 1, 2012, Plaintiffs served their Plaintiffs' Sixth Request, which includes Request 51, seeking:

51. All documents constituting communications, including any emails, since July 1, 2009, between BCBSM, including BCBSM's inside counsel or outside counsel, and persons other than employees or agents of BCBSM, relating to:
  - a. The investigation(s) commenced in 2010 by the United States and/or State of Michigan into BCBSM's use of MFN provisions;
  - b. The investigation(s) commenced in 2009 by the United States and/or State of Michigan into BCBSM's proposed acquisition of Physicians Health Plan of Mid-Michigan;
  - c. The lawsuit *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*, 2:10-cv-14155-DPH-MKM;
  - d. Any of the private lawsuits filed against Blue Cross Blue Shield of Michigan by the Shane Group et al., 2:10-cv-14360-DPH-MKM; Michigan Regional Council of Carpenters Employee Benefits Fund et al. 2:10-cv-14887-DPH-MKM; or Scott Steele et al., 2:11-cv-10375-DPH-VNM;
  - e. Any of the private lawsuits filed against Blue Cross Blue Shield of Michigan et al. by the City of Pontiac et al., 2:11-cv-10276-DPH-MKM, or by Frankenmuth Mutual Insurance Company et al., 2:10-cv-14633-LPZ-MAR; or
  - f. The lawsuit *Aetna, Inc., v. Blue Cross Blue Shield of Michigan*, 2:11-cv-15346-DPMMKM.

Ex. 1 at ¶ 51.<sup>3</sup>

Blue Cross responded solely with objections. *See* Def.’s Objections to Pls.’ Sixth Req. Produc. Docs. (Ex. 2). Foremost, Blue Cross objected to Request No. 51 on relevance grounds. *Id.* at 2. In a meet-and-confer discussion on June 15, 2012, Blue Cross represented to Plaintiffs that it would produce only those communications between Blue Cross and non-parties (1) that relate to narrowing the scope of a subpoena (which simply observes Blue Cross’s obligation under the Case-Management Order, Doc. #177 at ¶ 4.c), and (2) that took place prior to the complaint and are “about MFNs.” Ex. 3 at 1. Except for subpoena modifications, Blue Cross refuses to produce *any* documents constituting communications with non-parties that occurred in the 20 months since the complaint was filed.

On June 19, 2012, Plaintiffs asked Blue Cross to reconcile its relevance objection to Request 51 with Blue Cross’s own discovery practices. *See* Ex. 3. Plaintiffs noted several examples of Blue Cross’s requests for communications between non-parties and the United States—requests parallel to Request 51. *Id.* at 2–3. For instance, on February 16, 2012, counsel for Blue Cross requested that the Department of Justice “supplement” its response to Blue Cross’s Second Request for Production of Documents “with any documents reflecting its communications with Aetna, Priority, and any other commercial insurers since [the DOJ’s] last production.” *See* Ex. 5 at 1–2.<sup>4</sup> Blue Cross has also sought communications between Plaintiffs

---

<sup>3</sup> Blue Cross has been on notice for nearly a year that Plaintiffs seek many of the documents asked for in Request 51. On August 2, 2011, Plaintiffs served their Second Request for Production of Documents, including Request 10, which sought many of the same communications as those sought in Request 51. Blue Cross responded with an objection nearly identical to the one at issue in this Motion and has never produced responsive documents. Request 51 broadened and clarified the earlier request.

<sup>4</sup> Blue Cross’s Second Request for Production of Documents sought “all documents memorializing any communication or meeting (with persons other than agents or employees of

and non-parties from approximately 145 non-party subpoena recipients. In fact, on May 11, 2012, approximately three weeks before Blue Cross objected to Request 51 on relevance grounds, Blue Cross moved to enforce a non-party subpoena that requested, in part, the same type of documents that Blue Cross refuses itself to produce. *See* Ex. 6 at 90 (Blue Cross motion seeking to enforce production of “[a]ll documents reflecting any communications between [the hospital] and anyone from the U.S. Department of Justice regarding this litigation in any way *or* regarding MFNs, whether as used by BCBSM or any other entity”) (emphasis added).

Even after bringing these many examples of Blue Cross’s attempts to discover the same type of communications—communications between the adverse party and non-parties—on the very same topics Plaintiffs seek in Request 51 to Blue Cross’s attention, Blue Cross refuses to comply with Request 51.

### **ARGUMENT**

Federal Rule of Civil Procedure 26(b) “allows 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.” *Kormos v. Sportsstuff, Inc.*, 2007 WL 2571969, at \*1 (E.D. Mich. Sept. 4, 2007) (Majzoub, Maj. J.). In resolving this discovery dispute, “[t]he Court is guided by the strong, overarching policy of allowing liberal discovery.” *Id.*

Here, the requested documents are reasonably calculated to lead to the discovery of admissible evidence. First, they are likely to bear on issues going to the merits of the case, such as market definition and the anticompetitive impact of the MFNs. In fact, some of the

---

the United States Department of Justice) relating to any pre-Complaint information gathered by you relating to any allegation in the Complaint.” Ex. 4 at 4. Plaintiffs have produced all such responsive documents.

documents in question likely will not only lead to the discovery of admissible evidence, but will themselves be admissible evidence. Second, they are likely to aid in determining whether various deponents or live witnesses in this case are biased, whether Blue Cross or any other party has influenced them, and whether their testimony is credible.

**I. The documents that Request 51 seeks are reasonably calculated to lead to the discovery of admissible evidence concerning important issues in this case.**

The documents that Plaintiffs seek in Request 51 will illuminate Blue Cross’s defenses to issues such as market definition, market power, and the competitive effects of its MFN clauses. Indeed, in one antitrust discovery dispute, the court ruled that the defendant was required to produce communications between itself and a non-party regarding an entirely separate antitrust suit in which the defendant was involved, even though that suit implicated a *different market* from the market pled in the case in which the discovery was sought. *White Mule Co. v. ATC Leasing Co.*, 2008 WL 2680273, at \*4–5 (N.D. Ohio June 25, 2008). The court reasoned that, because the markets implicated in the two lawsuits were “intertwined,” information about the related lawsuit—including the communications between the defendant and non-parties concerning it—would help the plaintiff gain “a complete understanding” of the relevant market. *Id.* at \*5. Here, the documents sought concern communications relating to *this suit* and related MFN suits, and therefore implicate the *same markets* and the *same course of conduct* as does this case.<sup>5</sup> If the discovery in *White Mule* was relevant, then logic compels even more forcefully that Request 51 appropriately seeks relevant documents.

---

<sup>5</sup> The communications relating to the investigation by the United States and the State of Michigan of Blue Cross’s proposed acquisition of Physician’s Health Plan of Mid-Michigan, although not concerning MFN clauses specifically, are likely to contain substantial amounts of information concerning the state of the commercial health insurance competition in the Lansing metropolitan area, which is one of the relevant geographic markets pled in this case. Accordingly, these documents will also contribute to a “complete understanding” of a relevant

The fact that information sought in Request 51 likely will lead to the discovery of admissible evidence on crucial issues going to the heart of this case, such as market definition, market power, and the competitive effects of the MFNs at issue in this case is likely why Blue Cross has sought, through approximately 145 non-party subpoenas and numerous depositions of non-parties, communications between Plaintiffs and non-parties on the very same subject matters that Plaintiffs seek in Request 51. *See* Ex. 3 App. A. For example:

- Blue Cross’s non-party subpoenas to more than 100 hospitals seek “[a]ll documents reflecting any communications between [the hospital] and anyone from the U.S. Department of Justice regarding this litigation in any way *or* regarding MFNs, whether as used by BCBSM or any other entity.” *See, e.g.*, Ex. 7 Attach. A at ¶ 19 (emphasis added); *see also* Ex. 3 App. A at ¶ 1.
- Blue Cross’s subpoenas to 14 non-party insurers seek “[d]ocuments reflecting or discussing communications [insurers] 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 [insurers] had with DOJ.” *See, e.g.*, Ex. 8 at ¶ 28 (emphasis added); *see also* Ex. 3 App. A at ¶ 2.
- Blue Cross’s subpoena to non-party Michigan Association of Health Plans seeks “documents reflecting communications . . . with the Department of Justice, State of Michigan, or any other person *concerning any investigation being conducted by either DOJ or the State of Michigan into BCBSM’s contracting practices (including the use of MFNs) prior or subsequent to the filing of this lawsuit*, including emails,

---

market alleged in this case, and are thus clearly relevant. *See White Mule*, 2008 WL 2680273, at \*5.

white papers, or correspondence provided to the DOJ or State of Michigan, and any documents concerning any meetings or telephone calls [Michigan Association of Health Plans or its] members had with the DOJ or the State of Michigan on that subject including documents sufficient to identify all persons participating in such communications or meetings.” Ex. 9 at ¶ 28. (emphasis added); *see also* Ex. 3 App. A at ¶ 3.

- In numerous depositions Blue Cross has asked deponents to describe all communications that they had with DOJ personnel. *See, e.g.*, Ex. 10 at 21:9–23:24 (D. Babcock, Jan. 13, 2012); Ex. 11 at 174:3–175:14 (T. Johnson, May 7, 2012).
- In Blue Cross’s recently instituted subpoena-enforcement proceedings against non-party St. Catherine Hospital in the Northern District of Indiana, Blue Cross advised the court: “Blue Cross has explained, in multiple discussions with counsel for St. Catherine, that its requests fall into . . . five *straightforward* categories [including] [c]ommunications, if any, between the hospital and the U.S. Department of Justice regarding this litigation *or* MFNs generally (Request 19).” Ex. 6 at 6 (emphasis added).

Blue Cross has also requested the same sort of documents from Plaintiffs. For example, Request 14 of Blue Cross’s Second Request for Production of Documents sought “all documents memorializing any communication or meeting (with persons other than agents or employees of the United States Department of Justice) relating to any pre-Complaint information gathered by you relating to any allegation in the Complaint.” Ex. 4 at 4. Plaintiffs have produced all documents responsive to Blue Cross’s Request 14. The fact that Blue Cross sought only pre-

complaint communications from Plaintiffs has no legal significance. Blue Cross has not imposed such a temporal restriction in its related discovery directed to non-parties.<sup>6</sup>

Finally, an examination of two documents of the type sought in Request 51 illustrates the relevance of such documents to this case. On May 11, 2012, Blue Cross attached as exhibits two non-party email communications of the type sought in Request 51 to its memorandum in support of a motion to enforce a document subpoena against St. Catherine Hospital filed in the United States District Court for the Northern District of Indiana. *See* Ex. 6 at 104, 106. St Catherine, located in East Chicago, Indiana (over 75 miles from the nearest geographic market alleged in this case), Compl. at ¶ 28.h (Doc. # 1), had objected to the subpoena on relevance grounds. In those emails, counsel for St. Catherine stated to counsel for Blue Cross that St. Catherine “has no relationship with BCBS [and] does not compete for business in Michigan.” Ex. 6 at 104, 106. Such a statement contradicts Blue Cross’s contention to the Indiana court (a likely contention in this case as well) that St. Catherine “is plainly a viable geographic alternative for Southwest Michigan residents.” *See* Ex. 12 at 4. Other documents of this type would further undermine Blue Cross’s claims concerning market definition. Accordingly, discovery of these and similar documents are clearly reasonably calculated to lead to admissible evidence.

---

<sup>6</sup> Blue Cross’s contention in a meet-and-confer discussion that it would limit its production to only certain of its non-party communications pre-dating the complaint lacks factual and legal support. Where, as here, the challenged conduct is on-going, Blue Cross’s post-complaint communications with non-parties about this case and related matters are as relevant as pre-complaint communications. *See, e.g., United States v. City of Torrance*, 164 F.R.D. 493, 495 (C.D. Cal. 1995) (discovery of post-complaint documents was proper when “plaintiff’s allegations of discriminatory employment policies and practices by defendants [were] not limited to a time period prior to the filing of the First Amended Complaint”).

**II. The documents that Request 51 seeks are reasonably calculated to lead to the discovery of admissible evidence by providing information regarding the credibility of potential witnesses.**

“One of the purposes of discovery is to obtain information for use on cross-examination and for the impeachment of witnesses.” *United States v. IBM Corp.*, 66 F.R.D. 215, 219 (S.D.N.Y. 1974) (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)); *see also City of Torrance*, 164 F.R.D. at 495 (noting that material “relat[ing] to the credibility of a witness” is properly discoverable); Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2008 (3d ed. 2012) (“[I]nformation that might be used to impeach a likely witness [in a lawsuit], although not otherwise relevant to the claims or defenses, might be properly discoverable. . . . Information that might provide a basis for impeachment[] should still be available regularly.”). Furthermore, discovery may properly be had if it might “establish the nature and extent of [the deponents’] biases.” *IBM Corp.*, 66 F.R.D. at 218 (alteration in original); *see also Wright & Miller, supra*, § 2015 (“[P]roof of bias . . . cannot be excluded from the scope of discovery.”).

Information concerning communications between an opposing party or its counsel and potential witnesses can also be a crucial means by which the party seeking discovery can determine whether and to what extent the witness has been “coached” by an adversary. *See SEC v. Gupta*, --- F. Supp. 2d ----, 2012 WL 990779, at \*3 (S.D.N.Y. Mar. 26, 2012) (allowing the defendant to obtain discovery of communications between the plaintiff and a non-party witness because it was necessary to allow the defendant to “determine how, if at all, a witness’s testimony was influenced . . . by suggestions from” the plaintiff).

A substantial number of the communications sought in Request 51 are between Blue Cross and non-parties that may be deposed and/or provide live testimony at trial. For example,

representatives of hospitals such as St. Catherine, which, as noted above, Blue Cross has corresponded with in connection with this case, are likely to be witnesses in this lawsuit. Accordingly, communications between Blue Cross and such parties will be an essential means by which the credibility of these potential witnesses can be assessed, *see City of Torrance*, 164 F.R.D. at 495, any biases can be determined, *see IBM Corp.*, 66 F.R.D. at 218, and any potential influence by Blue Cross over a non-party's testimony may be identified, *see Gupta*, 2012 WL 990779, at \*3.

In sum, application of relevant precedent establishes that the documents sought in Request 51 are reasonably calculated to lead to the discovery of admissible evidence, and that Blue Cross's objection to the contrary is improper.

Plaintiffs note that Blue Cross "further object[s] to Request 51 to the extent that it seeks information, documents, or communications that are protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other privilege." Blue Cross also objects that Request 51 is "overly broad and unduly burdensome." Ex. 2 at 2–3. These objections are without merit. Once the party seeking discovery makes a showing that the documents in question are relevant, the opposing party may not, as Blue Cross attempts to do here, rely on boilerplate statements to the effect that the documents are privileged or that it would be unduly burdensome to produce them. Indeed, "[t]he filing of boilerplate objections . . . is tantamount to filing no objections at all." *PML N. Am., L.L.C. v. World Wide Personnel Servs. of Va., Inc.*, 2008 WL 1809133, at \*1 (E.D. Mich. Apr. 21, 2008) (Majzoub, Mag. J.). Moreover, Blue Cross has the burden to establish both privilege and undue burden. *See In re Columbia/HCA Healthcare Billing Practices*, 293 F.3d 289, 294 (6th Cir. 2002) ("[T]he burden of establishing the existence of the privilege rests with the person asserting it . . ."); *Tarleton v.*

*Meharry Med. Coll.*, 717 F.2d 1523, 1535 (6th Cir. 1983) (party resisting relevant discovery as unduly burdensome has a “heavy burden” to overcome).

In any event, Plaintiffs do not understand Blue Cross to argue that *all* of the requested documents are privileged. And since Request 51 seeks documents constituting *communications with third parties*, such a contention would generally be at odds with the law. “A communication by an attorney to a third party or a communication by a third party to an attorney cannot be invoked as privileged.” *In re Grand Jury Proceedings*, 616 F.3d 1172, 1183 (10th Cir. 2010); *cf. Masi v. DTE Energy Co.*, 2007 WL 2004914, at \*3 (E.D. Mich. July 10, 2007) (Majzoub, Mag. J.) (“When a party discloses a document which is protected by the attorney-client privilege to a third party, the party waives the attorney-client privilege . . .”).

## CONCLUSION

Blue Cross's refusal to comply with Request 51 is legally incorrect and in conflict with its own scope of discovery. Plaintiffs, therefore, respectfully request that the Court grant this Motion and order the discovery of relevant documents that Request 51 seeks. Plaintiffs further request a production schedule that will provide Plaintiffs with the ability to use the responsive documents in depositions, which will resume August 1, 2012, and conclude November 30, 2012. (Doc. # 175, 176).

Respectfully submitted,

By:

/s/ David Z. Gringer  
Antitrust Division  
United States Department of Justice  
450 5th Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 532-4537  
david.gringer@usdoj.gov  
*Attorney for the United States*

/s/ with the consent of M. Elizabeth Lippitt  
M. Elizabeth Lippitt (P-70373)  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
lippitte@michigan.gov  
*Attorney for the State of Michigan*

July 5, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on July 5, 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.

/s/ David Z. Gringer  
Antitrust Division  
United States Department of Justice  
450 5th Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 532-4537  
david.gringer@usdoj.gov

**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

**INDEX TO EXHIBITS TO  
PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS  
RESPONSIVE TO PLAINTIFF'S DOCUMENT REQUEST 51**

1. Plaintiffs' Sixth Request for Production of Documents from Blue Cross Blue Shield of Michigan (May 1, 2012)
2. Defendant Blue Cross Blue Shield of Michigan's Objections to Plaintiffs' Sixth Request for Production of Documents (June 5, 2012)
3. Letter from Amy Fitzpatrick, U.S. Dept. of Justice, to Ashley Cummings, Hunton & Williams (June 19, 2012)
4. Defendant Blue Cross Blue Shield of Michigan's Second Request for Production of Documents to Plaintiff the United States of America (July 21, 2011)
5. Letter from Amy Fitzpatrick, U.S. Dept. of Justice, to Ashley Cummings, Hunton & Williams (Feb. 23, 2012)
6. Memorandum in Support of Defendant Blue Cross Blue Shield of Michigan's Motion to Compel Response to Subpoena for Documents (May 11, 2012)
7. Defendant Blue Cross Blue Shield of Michigan's Notice of Subpoena to Cleveland Clinic (May 15, 2012)
8. Defendant Blue Cross Blue Shield of Michigan's Notice of Subpoena to Assurant Health (Feb. 7, 2012)

9. Defendant Blue Cross Blue Shield of Michigan's Notice of Subpoena to Michigan Association of Health Plans (February 16, 2012)
10. Deposition of Dan Babcock (Jan. 13, 2012)
11. Deposition of Timothy J. Johnson (May 7, 2012)
12. Reply in Support of Defendant Blue Cross Blue Shield of Michigan's Motion to Compel Response to Subpoena for Documents (June 4, 2012)



- A. The terms "**BCBSM**," "**you**," or "**your company**" or mean Blue Cross Blue Shield of Michigan, its parents, predecessors, divisions, subsidiaries (including the Blue Care Network), affiliates, partnerships and joint ventures, and all of its directors, officers, employees, agents, and representatives. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which the company holds at least a 50 percent interest, regardless of how the company's interest is measured (*e.g.*, number of shares, degree of control, board seats, or votes).
- B. The terms "**and**" and "**or**" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of each of the Request all responses that might otherwise be construed to be outside of their scope.
- C. The term "**any**" means each and every.
- D. The term "**communication**" means any provision, receipt, or exchange of any information or opinion, in any manner or form (including any oral, telephonic, written, or electronic communication).
- E. The term "**concerning**" means in whole or in part discussing, describing, identifying, regarding or stating.
- F. The term "**document**" is synonymous in meaning and scope to that term in Federal Rule of Civil Procedure 34(a)(1)(A). The term includes electronically stored information, including all electronic communications (*e.g.*, emails and attachments), files, data and databases. The term includes each copy that is not identical to any other copy.
- G. The term "**including**" means including but not limited to.
- H. The term "**relating to**" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

**INSTRUCTIONS**

- A. In addition to the specific instructions below, this Document Request incorporates the instructions set forth in Federal Rule of Civil Procedure 34.
- B. The Plaintiffs will accept production of business documents as Summation load files, consistent with the manner in which documents were previously produced during this litigation. Electronic documents, such as Excel or PowerPoint, should be produced in their native format with a Bates-numbered tiff image of at least the first page. Each electronic media device must be labeled to identify the contents of the device, the source of the information, and the document control numbers of the documents contained on the device.
- C. Identify any search terms or search methodologies you intend to use before conducting a search for any electronically stored information, so that the parties can confer in good faith in advance of the search.
- D. If you intend to use any de-duplication software or services when collecting or reviewing electronically stored information in response to this Discovery Request, contact the Plaintiffs in advance to discuss the manner in which the company intends to use de-duplication software or services.
- E. Any documents that are withheld in whole or in part based on a claim of privilege shall be assigned document control numbers with unique consecutive numbers for each page of each document. For purposes of this instruction, each attachment to a document shall be treated as a separate document and separately logged, if withheld, and cross referenced, if produced. For each document, the company shall provide a privilege log that includes a statement of the claim of privilege and sufficiently describes the facts justifying

withholding the document to allow the Plaintiffs to assess the privilege claim. You are encouraged to propose categorical limitations to exclude certain classes of privileged documents from the log.

**DOCUMENTS REQUESTED**

51. All documents constituting communications, including any emails, since July 1, 2009, between BCBSM, including BCBSM's inside counsel or outside counsel, and persons other than agents or employees of BCBSM, relating to:

- a. the investigation(s) commenced in 2010 by the United States and/or State of Michigan into BCBSM's use of MFN provisions;
- b. the investigation(s) commenced in 2009 by the United States and/or State of Michigan into BCBSM's proposed acquisition of Physicians Health Plan of Mid-Michigan;
- c. the lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM;
- d. any of the private lawsuits filed against Blue Cross Blue Shield of Michigan by the Shane Group et al., 2:10-cv-14360-DPH-MKM; Michigan Regional Council of Carpenters Employee Benefits Fund et al. 2:10-cv-14887-DPH-MKM; or Scott Steele et al., 2:11-cv-10375-DPH-VNM;
- e. any of the private lawsuits filed against Blue Cross Blue Shield of Michigan et al. by the City of Pontiac et al., 2:11-cv-10276-DPH-MKM, or by Frankenmuth Mutual Insurance Company et al., 2:10-cv-14633-LPZ -MAR; or
- f. the lawsuit Aetna, Inc. v. Blue Cross Blue Shield of Michigan, 2:11-cv-15346-DPM-MKM.

52. All communications, including any emails, since January 1, 2010, sent to or received by Christopher Fahrenkopf, Rick Stout, Aaron Gniewek, or any other BCBSM employee in the data services department or on the Enterprise Storage Management Team employee concerning:

- a. searching for emails and attachments responsive to Plaintiffs' Second Request for Documents or any other Request for Documents issued by Plaintiffs in the lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM;
- b. searching for emails and attachments responsive to any Request for Documents issued by Aetna in the lawsuit Aetna, Inc. v. Blue Cross Blue Shield of Michigan, 2:11-cv-15346-DPM-MKM;
- c. searching for emails and attachments responsive to the U.S. Department of Justice Civil Investigative Demand #25965; or
- d. preservation, retention or deletion of any emails or email attachments responsive to Plaintiffs' Second Request for Documents or any other Request for Documents issued by Plaintiffs in the lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM.

53. All documents, since January 1, 2010, concerning any actual or contemplated post-employment relationship, including any consulting relationship, between BCBSM and Kevin Seitz, Michael Schwartz, Kim Sorget, Douglas Darland, or Austin Wallace, or describing the terms of any pension or other retirement benefits provided by BCBSM to any of the foregoing individuals.

Respectfully submitted,

/s/ with consent of Thomas S. Marks  
Assistant Attorney General (P-69868)  
G. Mennen Williams Building, 6<sup>th</sup> Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
MarksT@michigan.gov  
*Attorney for Plaintiff State of Michigan*

/s/ Barry Joyce  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W. 20530  
(202) 353-4209  
barry.joyce@usdoj.gov

Amy Fitzpatrick  
Barry Joyce  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530

*Attorneys for Plaintiff  
United States of America*



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

UNITED STATES OF AMERICA  
and the STATE OF MICHIGAN,

Plaintiffs,

v.

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

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

Defendant.

---

**DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S OBJECTIONS TO  
PLAINTIFFS' SIXTH REQUEST FOR PRODUCTION OF DOCUMENTS**

Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

Todd M. Stenerson (P51953)  
D. Bruce Hoffman (Adm. E.D. MI, DC Bar 495385)  
Neil K. Gilman (Adm. E.D. MI, DC Bar 449226)  
David A. Higbee (Adm. E.D. MI; DC Bar 500605)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
202-955-1500  
tstenerson@hunton.com

Robert A. Phillips (P58496)  
BLUE CROSS BLUE SHIELD OF MICHIGAN  
600 Lafayette East, MC 1925  
Detroit, MI 48226  
313-225-0536  
rphillips@bcbsm.com

---

**DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S OBJECTIONS TO PLAINTIFFS' SIXTH REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Michigan, Defendant Blue Cross Blue Shield of Michigan ("Blue Cross") objects and responds to Plaintiffs' Sixth Request for Production of Documents.

**DOCUMENT REQUEST NO. 51:**

All documents constituting communications, including any emails, since July 1, 2009, between BCBSM, including BCBSM's inside counsel or outside counsel, and persons other than agents or employees of BCBSM, relating to:

- a. the investigation(s) commenced in 2010 by the United States and/or State of Michigan into BCBSM's use of MFN provisions;
- b. the investigation(s) commenced in 2009 by the United States and/or State of Michigan into BCBSM's proposed acquisition of Physicians Health Plan of Mid-Michigan;
- c. the lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM;
- d. any of the private lawsuits filed against Blue Cross Blue Shield of Michigan by the Shane Group et al., 2:10-cv-14360-DPH-MKM; Michigan Regional Council of Carpenters Employee Benefits Fund et al. 2:10-cv-14887-DPH-MKM; or Scott Steele et al., 2:11-cv-10375-DPH-VNM;
- e. any of the private lawsuits filed against Blue Cross Blue Shield of Michigan et al. by the City of Pontiac et al., 2:11-cv-10276-DPH-MKM, or by Frankenmuth Mutual Insurance Company et al., 2:10-cv-14633-LPZ -MAR; or
- f. the lawsuit Aetna, Inc. v. Blue Cross Blue Shield of Michigan, 2:11-cv-15346-DPMMKM.

**RESPONSE TO REQUEST NO. 51:**

Blue Cross objects to Request No. 51 because it seeks documents that are neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. Blue Cross further objects to Request No. 51 to the extent it seeks information, documents, or communications that are protected from disclosure by the attorney-client privilege, the attorney

work-product doctrine, or any other privilege. Documents, including but not limited to emails, between Blue Cross custodians and “persons other than agents or employees of BCBSM” have been collected and, to the extent they contain information that is relevant or reasonably calculated to lead to the discovery of admissible evidence, those documents have been or will be produced. Objecting further, Blue Cross states that Request No. 51 is overly broad and unduly burdensome in that it places unnecessary and unwarranted burdens on inside and outside counsel to search and produce documents that do not inform the issues in the litigation — i.e., the alleged antitrust violations in any of Plaintiffs’ 34 separate alleged markets — despite Blue Cross having already produced over 2 million pages of documents. In addition, Blue Cross objects to the definition of the term “document” and to the “Instructions” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that definition or those “Instructions” seek to define or impose on Blue Cross obligations beyond those imposed under the Federal Rules of Civil Procedure.

**REQUEST NO. 52:**

All communications, including any emails, since January 1, 2010, sent to or received by Christopher Fahrenkopf, Rick Stout, Aaron Gniewek, or any other BCBSM employee in the data services department or on the Enterprise Storage Management Team employee concerning:

- a. searching for emails and attachments responsive to Plaintiffs’ Second Request for Documents or any other Request for Documents issued by Plaintiffs in the lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM;
- b. searching for emails and attachments responsive to any Request for Documents issued by Aetna in the lawsuit Aetna, Inc. v. Blue Cross Blue Shield of Michigan, 2:11-cv-15346-DPM-MKM;
- c. searching for emails and attachments responsive to the U.S. Department of Justice Civil Investigative Demand #25965; or
- d. preservation, retention or deletion of any emails or email attachments responsive to Plaintiffs’ Second Request for Documents or any other Request for Documents issued by

Plaintiffs in the lawsuit United States and State of Michigan v. Blue Cross Blue Shield of Michigan, 2:10-cv-14155-DPH-MKM.

**RESPONSE TO REQUEST NO. 52:**

Blue Cross objects to Request No. 52 because it seeks documents that are neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. Blue Cross further objects to Request No. 52 because it seeks information, documents, or communications that are protected from disclosure by the attorney-client privilege and the attorney work-product doctrine. Plaintiffs have already deposed Mr. Fahrenkopf at length on these issues, therefore Blue Cross further objects to Request No. 52 as cumulative, duplicative and unduly burdensome. Blue Cross has produced over 500,000 pages of documents from its email database with hundreds of thousands of additional pages slated for review, and has agreed to collect and de-duplicate still more documents from its email database; thus there is no legitimate or reasonable basis for Request No. 52; Blue Cross, therefore, objects to Request No. 52 on the basis that it is designed for harassment and distraction. In addition, Blue Cross objects to the definition of the term “document” and to the “Instructions” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that definition or those “Instructions” seek to define or impose on Blue Cross obligations beyond those imposed under the Federal Rules of Civil Procedure.

**REQUEST NO. 53:**

All documents, since January 1, 2010, concerning any actual or contemplated postemployment relationship, including any consulting relationship, between BCBSM and Kevin Seitz, Michael Schwartz, Kim Sorget, Douglas Darland, or Austin Wallace, or describing the terms of any pension or other retirement benefits provided by BCBSM to any of the foregoing individuals.

**RESPONSE TO REQUEST NO. 53:**

Blue Cross objects to Request No. 53 because it seeks documents that are neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. Blue

Cross further objects to Request No. 53 because it seeks information, documents, or communications that are protected from disclosure by the attorney-client privilege and the attorney work-product doctrine. In addition, Blue Cross objects to the definition of the term “document” and to the “Instructions” as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that definition or those “Instructions” seek to define or impose on Blue Cross obligations beyond those imposed under the Federal Rules of Civil Procedure.

/s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Hunton & Williams LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
Phone: 202-955-1500  
Fax: 202-778-7436  
tstenerson@hunton.com

**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2012 I served the foregoing Blue Cross Blue Shield of Michigan's Objections to Plaintiffs' Sixth Request for Production of Documents via electronic mail on:

Amy R. Fitzpatrick  
Trial Attorney  
United States Department of Justice  
Antitrust Division  
450 Fifth Street N.W., Suite 4100  
Washington D.C. 20001  
Telephone: (202) 353-4209  
E-mail: amy.fitzpatrick@usdoj.gov

*Attorneys for Plaintiff United States of America*

M. Elizabeth Lippitt  
Corporate Oversight Division  
Michigan Department of Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
Telephone: (517) 373-1160  
E-mail: LippittE@michigan.gov

*Attorney for Plaintiff State of Michigan*

/s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Hunton & Williams LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
Phone: 202-955-1500  
Fax: 202-778-7436  
tstenerson@hunton.com



**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*

June 19, 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' Document Request No. 51  
*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 you know, Plaintiffs' Document Request No. 51, served May 1, 2012, seeks all documents constituting communications, including any emails, since July 1, 2009, between Blue Cross, including Blue Cross's inside counsel or outside counsel, and persons other than agents or employees of Blue Cross, relating to the litigation in this case and the private actions as well as pre-complaint investigations. Blue Cross has broadly objected to producing responsive documents based on relevance and privilege.

In our latest meet and confer discussion on June 15 you informed plaintiffs that in response to Plaintiffs' Request 51, Blue Cross would limit its production to (1) all correspondence between Blue Cross counsel and non-parties that reflects narrowing of the scope of a subpoena, and (2) all communications between Blue Cross counsel and non-parties or between Blue Cross personnel and non-parties that pre-date the complaint and "that are about MFNs." You did not explain how Blue Cross would determine whether a communication is "about MFNs." And your agreement to produce correspondence that reflects narrowing of the scope of a subpoena simply adheres to your obligation under the existing case-management order. Dkt. No. 177 at ¶ 4.c. You have

Ashley Cummings, Esq.  
June 19, 2012  
Page 2 of 7

also indicated that some responsive documents from certain email custodians may have been or will be produced in response to other document requests.

Plaintiffs understand that, except for subpoena modifications, Blue Cross refuses to produce any requested communications that post-date the complaint, including even post-complaint communications “that are about MFNs.” Plaintiffs also understand that Blue Cross refuses to produce communications that pre-date the filing of the complaint unless a communication is specifically “about MFNs.” Based on Blue Cross’s response to Request 51 and our discussion on June 15, plaintiffs understand Blue Cross to claim that Blue Cross’s communications with non-parties are “not relevant” and that plaintiffs have “no basis on which to ask for these communications.” Blue Cross does not, however, deny that such communications with non-parties exist.

Plaintiffs believe that the relevance of the requested documents is clear. Indeed, plaintiffs find Blue Cross’s position on this issue to be surprising given that Blue Cross has itself sought communications between plaintiffs and non-parties from almost every one of its approximately 145 non-party subpoena recipients<sup>1</sup> without the limitations that Blue Cross would impose on plaintiffs’ request concerning time period (pre-complaint only) or subject matter (reflecting narrowing of the scope of a subpoena or “about MFNs”). For example:

- Blue Cross’s non-party subpoenas to more than 100 hospitals seek “[a]ll documents reflecting any communications between [the hospital] and anyone from the U.S. Department of Justice *regarding this litigation in any way or regarding MFNs*, whether as used by BCBSM or any other entity.”<sup>2</sup>
- Blue Cross’s non-party subpoenas to approximately 14 insurers seek “[d]ocuments reflecting or discussing communications [insurers] 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 [insurers] had with DOJ.”<sup>3</sup>
- Blue Cross’s non-party subpoena to the Michigan Association of Health Plans seeks “documents reflecting communications . . . with the Department of Justice, State of Michigan, or any other person *concerning any investigation being conducted by either DOJ or the State of Michigan into BCBSM’s contracting practices (including the use of MFNs) prior or subsequent to*

---

<sup>1</sup> Plaintiffs were able to locate only two Blue Cross document subpoenas (Whirlpool Corporation and VHS Harper-Hutzel Hospital) that do not appear to include a request for communications with DOJ.

<sup>2</sup> See Appendix A at ¶ 1 (emphasis added).

<sup>3</sup> See Appendix A at ¶ 2 (emphasis added).

Ashley Cummings, Esq.

June 19, 2012

Page 3 of 7

*the filing of this lawsuit*, including emails, white papers, or correspondence provided to the DOJ or State of Michigan, and any documents concerning any meetings or telephone calls [Michigan Association of Health Plans or its] members had with the DOJ or the State of Michigan on that subject including documents sufficient to identify all persons participating in such communications or meetings.”<sup>4</sup>

- In Blue Cross’s recently instituted subpoena-enforcement proceedings against St. Catherine’s Hospital in the Northern District of Indiana, Blue Cross advised the court: “Blue Cross has explained, in multiple discussions with counsel for St. Catherine, that its requests fall into . . . five *straightforward* categories [including] [c]ommunications, if any, between the hospital and the U.S. Department of Justice *regarding this litigation or MFNs generally* (Request 19).”

In addition, in numerous depositions counsel representing Blue Cross has asked deponents to describe all communications that they have had with DOJ personnel.<sup>5</sup> Finally, Blue Cross has never articulated its reasoning for claiming privilege regarding its (and its counsel’s) email or other written correspondence with non-parties.

Please let me know by June 25, 2012, whether Blue Cross will withdraw its objections and produce the requested documents by July 31, 2012. If Blue Cross does not inform plaintiffs of a change in its position on this issue, plaintiffs will be forced to seek assistance from the Court. In addition, if plaintiffs’ understanding of Blue Cross’s position is in any way inaccurate, please let me know immediately.

Best regards,

/s/

Amy R. Fitzpatrick  
Trial Attorney

cc: Elizabeth Lippitt, Esq.  
Thomas Marks, Esq.  
Mary Jane Fait, Esq.  
John Tangren, Esq.  
Beth Landes, Esq.

---

<sup>4</sup> Request 28 to Michigan Association of Health plans (Feb. 16, 2012) (emphasis added). *See also* Appendix A at ¶ 3.

<sup>5</sup> *See, e.g.*, Tr. of Dep. of D. Babcock at 22-25 (Jan. 13, 2012); Tr. of Dep. of J. Wehner at 29-33 (Jan. 11, 2012).

Ashley Cummings, Esq.

June 19, 2012

Page 4 of 7

Daniel Small, Esq.

Rob Cacace, Esq.

Meghan Boone, Esq.

Dan Gustafson, Esq.

Dan Hedlund, Esq.

Ellen Ahrens, Esq.

E. Powell Miller, Esq.

Jennifer Frushour, Esq.

Veronica Lewis, Esq.

Joshua Lipton, Esq.

Sarah Wilson, Esq.

Dan Matheson, Esq.

Cara Fitzgerald, Esq.

Ashley Cummings, Esq.

June 19, 2012

Page 5 of 7

**Appendix A**

1. Blue Cross subpoenas containing a request for “[a]ll documents reflecting any communications between you and anyone from the U.S. Department of Justice regarding this litigation in any way or regarding MFNs, whether as used by BCBSM or any other entity” include:

Request 19 to Cleveland Clinic (May 15, 2012); Request 21 to Forest Health Medical Center (Apr. 11, 2012); Request 21 to Gratiot Medical Center (Apr. 11, 2012); Request 21 to Doctors’ Hospital of Michigan (Apr. 11, 2012); Request 21 to Covenant Medical Center (Apr. 11, 2012); Request 21 to Bronson Vicksburg Hospital (Apr. 11, 2012); Request 21 to Bronson Methodist Hospital (Apr. 11, 2012); Request 21 to Bronson LakeView Hospital (Apr. 11, 2012); Request 21 to Battle Creek VAMC (Apr. 11, 2012); Request 21 to Allegiance Health (Apr. 11, 2012); Request 21 to Aleda E. Lutz Department of Veterans (Apr. 11, 2012); Request 21 to Carson City Hospital (Apr. 11, 2012); Request 21 to VA Ann Arbor Healthcare System (Apr. 11, 2012); Request 21 to University of Michigan Health System (Apr. 11, 2012); Request 24 to Spectrum Hospitals (Apr. 11, 2012); Request 24 to Sparrow Hospitals (Apr. 11, 2012); Request 21 to Southeast Michigan Surgical Hospital (April 11, 2012); Request 21 to Sinai-Grace Hospital (Apr. 11, 2012); Request 21 to Mid-Michigan Medical Center-Midland (Apr. 11, 2012); Request 21 to Mid-Michigan Medical Center-Gladwin (Apr. 11, 2012); Request 21 to Mid-Michigan Medical Center-Clare (Apr. 11, 2012); Request 21 to Lakeland Hospitals and Niles and St. Joseph (Apr. 11, 2012); Request 21 to Karmanos Cancer Center (Apr. 11, 2012); Request 21 to John D. Dingell VA Medical Center (Apr. 11, 2012); Request 21 to Huron Valley Sinai Hospital (Apr. 11, 2012); Request 21 to North Orrowa Community Hospital (Apr. 12, 2012); Request 21 to Apirus Keewenaw (Mar. 8, 2012); Request 21 to Lakeland Community Hospital Watervliet (Feb. 9, 2012); Request 21 to McLaren Regional Medical Center (Jan. 23, 2012); Request 21 to Northern Michigan Regional Hospital (Jan. 23, 2012); Request 21 to Mount Clemens Regional medical Center (Jan. 23, 2012); Request 21 to Lapeer Regional medical Center (Jan. 23, 2012); Request 21 to Ingham Regional Medical Center (Jan. 23, 2012); Request 21 to POH Regional Medical Center (Jan. 23, 2012); Request 21 to Bay Regional Medical Center (Jan. 23, 2012); Request 21 to Baraga County Memorial Hospital (Jan. 11, 2012); Request 21 to Charlevoix Area Hospital (Jan. 11, 2012); Request 21 to West Shore Medical Center (Jan. 11, 2012); Request 21 to West Branch Regional Medical Center (Jan. 11, 2012); Request 21 to Sturgis Hospital (Jan. 11, 2012); Request 21 to Straith Hospital for Special Surgery (Jan. 11, 2012); Request 21 to South Haven Community Hospital (Jan. 11, 2012); Request 21 to Sheridan Community Hospital (Jan. 11, 2012); Request 21 to Schoolcraft Memorial Hospital (Jan. 11, 2012); Request 21 to Port Huron Hospital (Jan. 11, 2012); Request 21 to Pennock Hospital (Jan. 11, 2012); Request 21 to Otsego Memorial Hospital (Jan. 11, 2012); Request 21 to Oaklawn Hospital (Jan. 11, 2012); Request 21 to Oakland Regional Hospital (Jan. 11, 2012); Request 21 to Munising Memorial Hospital (Jan. 11, 2012); Request 21 to Metropolitan Hospital (Jan. 11, 2012); Request 21 to Mercy

Ashley Cummings, Esq.

June 19, 2012

Page 6 of 7

Memorial Hospital (Jan. 11, 2012); Request 21 to Memorial Medical Center (Jan. 11, 2012); Request 21 to Memorial Healthcare (Jan. 11, 2012); Request 21 to Marquette General Health System (Jan. 11, 2012); Request 21 to Mecosta County Medical Center (Jan. 11, 2012); Request 21 to Mackinac Straits Hospital and Health Center (Jan. 11, 2012); Request 21 to Kalkaska Memorial Health Center (Jan. 11, 2012); Request 21 to Hurley Medical Center (Jan. 11, 2012); Request 21 to Holland Hospital (Jan. 11, 2012); Request 21 to Hillsdale Community Health Center (Jan. 11, 2012); Request 21 to Helen Newberry Joy Hospital (Jan. 11, 2012); Request 21 to Hayes Green Beach Memorial Hospital (Jan. 11, 2012); Request 21 to Garden City Hospital (Jan. 11, 2012); Request 21 to Eaton Rapids Medical Center (Jan. 11, 2012); Request 21 to Dickinson County Memorial Hospital (Jan. 11, 2012); Request 21 to Community Health Center of Branch County (Jan. 11, 2012); Request 21 to Clinton Memorial Hospital (Jan. 11, 2012); Request 21 to Chippewa County War Memorial Hospital (Jan. 11, 2012); Request 21 to Cheboygan Memorial Hospital (Jan. 11, 2012); Request 21 to Central Michigan Community Hospital (Jan. 11, 2012); Request 21 to Bell Memorial Hospital (Jan. 11, 2012); Request 21 to Crittenton Hospital (Jan. 3, 2012); Request 21 to Alpena Regional Medical Center (Nov. 8, 2011); Request 21 to Bixby Medical Center (Nov. 4, 2011); Request 21 to Herrick Medical Center (Nov. 4, 2011); Request 22 to St. Mary's Health Care (Nov. 1, 2011); Request 22 to Saint Joseph Mercy Port Huron (Nov. 1, 2011); Request 21 to Zieger Health Care Corporation (Nov. 1, 2011); Request 22 to Trinity Health Michigan (Nov. 1, 2011); Request 22 to St. Joseph Saline Hospital (Nov. 1, 2011); Request 22 to St. Mary Mercy Hospital (Nov. 1, 2011); Request 22 to Chelsea Community Hospital (Nov. 1, 2011); Request 22 to St. Joseph Mercy Hospital-Ann Arbor (Nov. 1, 2011); Request 22 to St. Joseph Mercy Hospital-Oakland (Nov. 1, 2011); Request 22 to Mercy Hospital Cadillac (Nov. 1, 2011); Request 22 to Mercy Hospital Grayling (Nov. 1, 2011); Request 22 to Hackley Hospital (Nov. 1, 2011); Request 21 to Lakeshore Community Hospital (Nov. 1, 2011); Request 22 to Mercy Health Partners-Mercy Campus (Nov. 1, 2011); Request 22 to Bronson Battle Creek Hospital (Oct. 31, 2011); Request 22 to Oakwood Hospital (Oct. 28, 2011); Request 22 to Henry Ford Health System (Oct. 28, 2011); Request 21 to Trinity Health Corporation (Oct. 28, 2011); Request 21 to Botsford General Hospital (Oct. 28, 2011); Request 21 to Beaumont Health System (Oct. 28, 2012); Request 21 to Munson Healthcare (Oct. 28, 2011); Request 21 to VHS Detroit Receiving Hospital (Oct. 27, 2011); Request 21 to Detroit Medical Center (Oct. 27, 2011); Request 21 to Three Rivers Health System (Oct. 18, 2012); Request 22 to Allegan General Hospital (Oct. 12, 2011); Request 19 to Aurora Baycare Medical Center (Oct. 12, 2011); Request 19 to Dupont Hospital (Oct. 7, 2011); Request 19 to Toledo Hospital (Oct. 7, 2011); Request 19 to St. Vincent Mercy Medical Center-Toledo (Oct. 7, 2011); Request 19 to Memorial Hospital of South Bend (Oct. 7, 2011); Request 19 to Lutheran Hospital of Indiana (Oct. 7, 2011); Request 21 to Oscar G. Johnson VA (Oct. 7, 2011); Request 19 to Community Hospital of Bremen (Oct. 7, 2011); Request 19 to Parkview North Hospital (Oct. 7, 2011); Request 19 to Elkhart General (Oct. 7, 2011); Request 21 to Northstar Health System (Oct. 7, 2011); Request 19 to St. Joseph Hospital at Marshfield Clinic (Oct. 7, 2011); Request 19 to Mayo Clinic-Saint Mary's Hospital

Ashley Cummings, Esq.

June 19, 2012

Page 7 of 7

(Oct. 7, 2011); Request 19 to Mayo Clinic Methodist Hospital (Oct. 7, 2011); Request 19 to St. Catherine's Hospital (Oct. 7, 2011); Request 19 to Bellin Health Systems (Oct. 6, 2011); Request 19 to St. Vincent Hospital of the Hospital Sisters of the Third Order of St. Francis (Oct. 6, 2011); Request 19 to Bellin Memorial Hospital (Oct. 6, 2011); Request 19 to Aspirus Wausau Hospital (Oct. 6, 2011); Request 19 to Mayo Clinic (Oct. 6, 2011); Request 21 to Portage Health Hospital (Oct. 6, 2011); Request 21 to Aspirus Ontonagon Hospital (Oct. 6, 2010); Request 21 to Grand View Hospital (Oct. 6, 2011); Request 21 to OSF St. Francis Hospital (Oct. 6, 2011); Request 21 to Caro Community Hospital (Oct. 5, 2011); Request 21 to Scheurer Hospital (Oct. 5, 2011); Request 21 to McKenzie Memorial Hospital (Oct. 5, 2011); Request 21 to Marlette Regional Hospital (Oct. 5, 2011); Request 21 to Huron Medical Center (Oct. 5, 2011); Request 21 to Hills and Dales General Hospital (Oct. 5, 2011); Request 21 to Deckerville Community Hospital (Oct. 5, 2011); Request 21 to Harbor Beach Community Hospital (Oct. 5, 2011).

2. Blue Cross subpoenas containing a request for “[d]ocuments 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” include:

Request 28 to Cigna (Apr. 3, 2012); Request 28 to Northwestern Mutual Life (April 3, 2012); Request 28 to Assurant Health (Feb. 7, 2012); Request 28 to Grand Valley Health Plan (Feb. 7, 2012); Request 28 to Paramount Care of Michigan (Feb. 7, 2012); Request 28 to Unicare Life & Health Insurance (Feb. 7, 2012); Request 28 to McLaren Health Plan (Feb. 7, 2012); Request 28 to Physicians’ Health Plan (Feb. 7, 2012); Request 28 to Priority Health (Feb. 7, 2012); Request 28 to Total Health Care (Feb. 7, 2012); Request 28 to United Health Plan (Feb. 7, 2012); Request 28 to Health Alliance Plan of Michigan (Feb. 7, 2012); Request 28 to Health Plus of Michigan (Feb. 7, 2012); Request 28 to Humana Medical Plan (Feb. 7, 2012).

3. One Blue Cross subpoena contains a request for “[d]ocuments reflecting communications . . . with the Department of Justice, State of Michigan, or any other person concerning any investigation being conducted by either DOJ or the State of Michigan into BCBSM’s contracting practices (including the use of MFNs) prior or subsequent to the filing of this lawsuit, including emails, white papers, or correspondence provided to the DOJ or State of Michigan, and any documents concerning any meetings or telephone calls [Michigan Association of Health Plans or its] members had with the DOJ or the State of Michigan on that subject including documents sufficient to identify all persons participating in such communications or meetings.” *See* Request 28 to Michigan Association of Health plans (Feb. 16, 2012).

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

UNITED STATES OF AMERICA  
and the STATE OF MICHIGAN,

Plaintiffs,

v.

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

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

Defendant.

---

**DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S  
SECOND REQUESTS FOR PRODUCTION OF DOCUMENTS  
TO PLAINTIFF THE UNITED STATES OF AMERICA**

Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

Todd M. Stenerson (P51953)  
D. Bruce Hoffman (Adm. E.D. MI,  
DC Bar 495385)  
Neil K. Gilman (Adm. E.D. MI,  
DC Bar 449226)  
Marty Steinberg (E.D. MI Admission  
pending; DC Bar 996403)  
David A. Higbee (E.D. MI Admission  
pending; DC Bar 500605)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037  
202-955-1500  
tstenerson@hunton.com

Robert A. Phillips (P58496)  
BLUE CROSS BLUE SHIELD OF  
MICHIGAN  
600 Lafayette East, MC 1925  
Detroit, MI 48226  
313-225-0536  
rphillips@bcbsm.com

---

Defendant Blue Cross Blue Shield of Michigan (“Blue Cross”), by counsel, pursuant to Federal Rule of Civil Procedure 34, requests that Plaintiff the United States of America produce for inspection and copying at Hunton & Williams LLP, 2200 Pennsylvania Avenue, N.W., Washington, DC 20037, within 30 days from the date of service of these requests, or at such other time and place as may be agreed upon among counsel, the following documents and things.

### **DEFINITIONS AND INSTRUCTIONS**

1. “Documents” shall have the broadest meaning ascribed by Fed. R. Civ. P. 34(a), and shall mean all written, recorded or graphic matter, or computer or electronic records of written, recorded or graphic matter, of every type or description in your possession, custody, or control, whether an original, copy, or draft, wherever located.

2. “Geographic Areas” means the following areas alleged by Plaintiffs to constitute relevant geographic markets: Western and Central Upper Peninsula; Lansing Metropolitan Statistical Area (MSA); Alpena Area; Traverse City Micropolitan Statistical Area; “Thumb” area; Detroit MSA; Flint MSA; Kalamazoo MSA; Saginaw MSA; Alma Micropolitan Statistical Area; Midland Micropolitan Statistical Area; Grand Rapids MSA; Allegan County; Iosco County; Montcalm County; Osceola County; and St. Joseph County. *See* Compl. ¶ 28.

3. Should you contend that any particular Request is beyond the scope of permissible discovery, specify in detail each and every ground, including claims of privilege, on which such contention rests. Provide sufficient details to permit the court to decide the validity of your objection.

4. With respect to any definition set forth above or any other word used herein (collectively, “Term”) that you believe to be vague or ambiguous, please identify the allegedly vague or ambiguous Term, set forth your understanding of the meaning of that Term, and answer the Request in accordance with your understanding.

5. Plaintiffs should not produce in response to these Requests any documents or things that Blue Cross previously produced to the U.S. Department of Justice in response to Civil Investigative Demands issued to Blue Cross concerning its contracting practices or its proposed acquisition of Physicians Health Plan of Michigan.

6. Unless otherwise indicated, these Requests cover the period commencing on January 1, 2004 to the date Plaintiffs filed their Complaint, October 18, 2010.

7. If any identified document was, but no longer is, in your possession or under your control, state precisely what disposition was made of it and identify the person who ordered or authorized such disposition.

8. Any documents responsive to these Requests that are not produced by a reason or a claim of privilege, work product, or for any other reason shall be identified in writing by: (a) date; (b) author; (c) recipient; (d) general subject matter; (e) identity of person or persons to whom the contents of the document have already been revealed; (f) identity of the person or entity now in possession or control of the document; and (g) the basis upon which it is being withheld. Your identification of such documents must be sufficiently detailed to permit assessment of whether your basis for withholding those documents is legally sufficient.

9. If no documents exist that are responsive to a particular Request, state in writing that no responsive documents exist.

10. All discovery requests are deemed to be continuing requests to the fullest extent contemplated by Fed. R. Civ. P. 26(e). If you identify any additional responsive document or information, you are to furnish a supplemental response and produce the document.

**REQUESTS FOR PRODUCTION**

1. All documents that reflect or concern any overpayments by Blue Cross for hospital services.
2. All documents that reflect or concern any instance in which Blue Cross agreed to a higher reimbursement rate for health care services in exchange for receiving an MFN (as alleged by example in Complaint ¶ 39a).
3. All documents that discuss, describe, define, substantiate, or support commercial group health insurance as a relevant product market.
4. All documents that discuss, describe, define, substantiate, or support commercial individual health insurance as a relevant product market.
5. All documents that discuss, describe, define, substantiate, or support any Geographic Area as a regional market for the sale of commercial group health insurance.
6. All documents that discuss, describe, define, substantiate, or support any Geographic Area as a regional market for the sale of commercial individual health insurance.
7. All documents that reflect or concern pro-competitive benefits, purposes or effects of any MFN or “lowest price” MFN entered into by Blue Cross in Michigan.
8. All documents that reflect or concern pro-competitive benefits, purposes or effects of any MFN or “lowest price” MFN entered into by purchasers of health care services.
9. All documents that reflect or concern anticompetitive purposes or effects of any MFN or “lowest price” MFN entered into by Blue Cross in Michigan.
10. All documents that reflect or concern anticompetitive purposes or effects of any MFN or “lowest price” MFN entered into by purchasers of health care services.

11. All documents that reflect or concern any instance in which a competitor raised insurance rates in any relevant market as a direct result of Blue Cross's use of MFNs in its contracts with hospitals in Michigan.

12. All documents that you consulted or on which you relied in formulating your response to any interrogatory propounded by Blue Cross.

13. All documents, transcripts, declarations, affidavits, witness statements, letters or other documents or things received by you in response to any Civil Investigative Demand that concern or relate to any allegation in the Complaint.

14. All documents memorializing any communication or meeting (with persons other than agents or employees of the United States Department of Justice) relating to any pre-Complaint information gathered by you relating to any allegation in the Complaint.

15. All documents, transcripts, declarations, affidavits, witness statements, letters or other documents or things received by you in response to any Civil Investigative Demand concerning any investigation into the use of MFNs in contracts between health care service providers and commercial group health insurers or commercial individual health insurers in the United States.

16. All documents, transcripts, declarations, affidavits, witness statements, letters or other items concerning any investigation by the State of Michigan into the use of MFNs in contracts between hospital service providers and commercial group health insurers or commercial individual health insurers and provided to you.

17. All documents that discuss, describe, define, substantiate, or support any of the following products as discrete product markets: health maintenance organization (HMO); point

of service (POS); HMO-based POS (HMO-POS); preferred provider organization (PPO); consumer-driven health plan (CDHP); traditional or fee-for-service plan; Medicare supplemental.

18. All documents that discuss, describe, define, substantiate, or support a national market for the sale of commercial group health insurance.

19. All documents that discuss, describe, define, substantiate, or support a national market for the sale of commercial individual health insurance.

20. All documents that discuss, describe, define, substantiate, or support a statewide market for the sale of commercial group health insurance.

21. All documents that discuss, describe, define, substantiate, or support a statewide market for the sale of commercial individual health insurance.

22. All documents that reflect or concern, or that you relied upon to calculate Blue Cross's market share in the commercial group health insurance market in each of the Geographic Areas.

23. All documents that reflect or concern, or that you relied upon to calculate Blue Cross's market share in the commercial individual health insurance market in each of the Geographic Areas.

24. All documents that reflect or concern, or that you relied upon to calculate the market share of entities other than Blue Cross in the commercial group health insurance market in each of the Geographic Areas.

25. All documents that reflect or concern, or that you relied upon to calculate the market share of entities other than Blue Cross in the commercial individual health insurance market in each of the Geographic Areas.

Respectfully submitted,

/s/ Todd M. Stenerson

Todd M. Stenerson (P51953)

Hunton & Williams LLP

2200 Pennsylvania Avenue, N.W.

Washington, D.C. 20037

Phone: 202-955-1500

Fax: 202-778-7436

tstenerson@hunton.com

**CERTIFICATE OF SERVICE**

I hereby certify that on July 21, 2011, I served the foregoing Second Requests for

Production of Documents via electronic mail on:

Barry Joyce  
Steven Kramer  
Ann Marie Blaylock  
Trial Attorneys  
United States Department of Justice  
Antitrust Division  
450 Fifth Street N.W., Suite 4100  
Washington D.C. 20001  
Telephone: (202) 353-4209  
E-mail: barry.joyce@usdoj.gov

*Attorneys for Plaintiff United States of America*

M. Elizabeth Lippitt  
Corporate Oversight Division  
Michigan Department of Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
Telephone: (517) 373-1160  
E-mail: LippittE@michigan.gov

*Attorney for Plaintiff State of Michigan*

/s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, D.C. 20037  
Phone: 202-955-1500  
Fax: 202-778-7436  
tstenerson@hunton.com



**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*

February 23, 2012

**VIA EMAIL**

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

Re: *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 responds to your email dated February 16, 2012, inquiring about Priority Health's withdrawal of its confidentiality designation of PH-DOJ-0002745, and the supplementation of the United States' document production.

First, you asked why the communication regarding Priority's withdrawal of its confidentiality designation of PH-DOJ-0002745 came from the United States, rather than Priority. The answer is, as suggested in my initial email message on the subject, that we were providing disclosure of Priority's withdrawal pursuant to Paragraph 9 of the Protective Order. As you know, Paragraph 9 provides that "[i]f a Party receives a confidentiality waiver to allow a deponent to be questioned on information that would otherwise be Confidential Information, that waiver . . . 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." See Doc. No. 36 at ¶ 9. In this case, Priority withdrew its confidentiality designation. Should Blue Cross obtain a similar waiver or withdrawal of confidentiality, plaintiffs would expect to receive notice from you, pursuant to Paragraph 9.

Your letter also states that "all communications between DOJ and Priority are subject to Blue Cross's Requests for Production" and asks "when DOJ will supplement

Ashley Cummings, Esq.

February 23, 2012

Page 2 of 2

its production with any documents reflecting its communications with Aetna, Priority and other commercial insurers since your last production.” I would appreciate it if you could provide us with the specific Requests that you believe call for the production of such documents.

We currently have no specific date in mind for a supplemental production. As you know, you and I have previously discussed reaching agreement on a date for the parties to exchange supplemental productions. However, because Blue Cross has not yet completed its initial production, setting such a date seems premature. In particular, plaintiffs are not aware of when Blue Cross intends to make its initial production of its and its outside counsel’s communications with non-parties, in response to Request 10 of Plaintiffs’ Second Request for Production of Documents. This request was served over six months ago, on August 2, 2011, and to date plaintiffs are unaware of any responsive production that includes Blue Cross’s outside counsel’s communications with non-parties. We look forward to receiving Blue Cross’s initial production of such documents, and we remain open to discussing a mutually agreeable date for the exchange of supplemental productions. In any case, we intend to comply with the requirements of Fed. R. Civ. P. 26(e).

As always, please do not hesitate to call me if you would like to discuss any of these issues further.

Best regards,

/s/

Amy R. Fitzpatrick  
Trial Attorney

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







The DOJ Action alleges that “[t]he relevant geographic market for the purpose of analyzing the effect of an MFN between Blue Cross and a hospital on the sale of commercial [and individual] health insurance is the area in which the seller operates and in which the purchaser can practicably turn for supplies or services.”<sup>13</sup> In defining their 17 separate geographic markets, plaintiffs allege that employers offering group health insurance to their employees, and individuals purchasing individual health insurance, demand insurance products that provide access to hospitals “in the areas in which they live and work.”<sup>14</sup> Among other defenses raised, Blue Cross contends that the 17 alleged geographic markets do not accurately reflect market realities. Plaintiffs, in fact, acknowledge that Michigan residents “travel across state lines” to receive health care—that is, to hospitals outside of the alleged geographic markets.<sup>15</sup> Whether the alleged product and geographic markets are correct is a hotly-contested issue in the litigation. To challenge those market definitions, Blue Cross expects that discovery will show that hospitals outside of the alleged geographic markets compete within those markets.<sup>16</sup>

Therefore, as part of its defense, and in accordance with Fed. R. Civ. P. 26(b)(1) and 45, Blue Cross issued non-party subpoenas to various hospitals, including St. Catherine, seeking the production of non-privileged documents relevant to plaintiffs’ claims and Blue Cross’s defenses.<sup>17</sup> St. Catherine has refused to produce documents responsive to Blue Cross’s

---

<sup>13</sup> Compl. ¶ 26, Ex. 1.

<sup>14</sup> *Id.* ¶ 25.

<sup>15</sup> *Id.* ¶ 11.

<sup>16</sup> Blue Cross does not agree that the methodologies applied by plaintiffs’ to identify their alleged product and geographic markets are appropriate; but, even if a court were to accept those methodologies, Blue Cross expects that discovery will show that plaintiffs’ application of those methodologies is not borne out by the evidence.

<sup>17</sup> *See* Subpoena to St. Catherine, attached as Ex. 3.

subpoena. St. Catherine has not, to date, served formal objections to the subpoena, however it has informally objected to the subpoena through correspondence from its counsel on a variety of grounds, addressed below.<sup>18</sup> Blue Cross moves to compel production, seeking to enforce its discovery rights under the Federal Rules of Civil Procedure, so that it can fairly and adequately defend itself in the litigation.

## II. ARGUMENT

St. Catherine's asserted objections that fall within the following four categories: (1) the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; (2) the requests are overly broad; (3) the requests are unduly burdensome; and (4) the requests seek privileged, proprietary or confidential information.<sup>19</sup> For the reasons described below, those objections are meritless and should be overruled, and the hospitals should be compelled to produce responsive documents.

### A. Blue Cross's Subpoenas Seek Relevant, Discoverable Information.

St. Catherine objects on the grounds that the subpoena seeks to discover information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.<sup>20</sup>

A third-party subpoena issued under Rule 45 is subject to the general relevancy standard applicable to discovery set forth in Rule 26(b)(1). *Syoss v. United States*, 181 F.R.D. 224, 226 (W.D.N.Y. 1998) (citing *Eisemann v. Greene*, No. 97 Civ. 6094, 1998 WL 164821, at \*2 (S.D.N.Y. Apr. 8, 1998)). Rule 26(b)(1) states, "Parties may obtain discovery regarding any

---

<sup>18</sup> See December 14, 2011 email from C. Metnick, attached as Ex. 4; January 26, 2012 email from C. Metnick, attached as Ex. 5.

<sup>19</sup> St. Catherine also initially objected to the subpoena on the grounds that it purported to require a non-party to produce documents "at a location that is outside the 100-mile limit set forth in [Fed.R.Civ.P.] 45." Ex. 4. St. Catherine subsequently noted that Blue Cross is willing to cure the alleged procedural deficiency, as described herein. See Ex. 5.

<sup>20</sup> December 14, 2011 email from C. Metnick, Ex. 4; January 26, 2012, Ex. 5.

nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). "Relevancy under this rule is construed broadly to encompass 'any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.'" *Borom v. Town of Merrillville*, No. 2:07 CV 98, 2009 WL 1617085, at \*1 (N.D. Ind. June 8, 2009) (quoting *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002)).

"Antitrust claims often rise or fall on the definition of the relevant market." *Bathke v. Casey's General Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995); see *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 738 (7th Cir. 2004) (plaintiffs "must precisely establish a relevant market. The relevant market has both a product and a geographic dimension.").

Blue Cross has explained, in multiple discussions with counsel for St. Catherine, that its requests fall into the following five straightforward categories:

- Documents regarding hospitals with which the hospital competes and its service areas (Requests 10, 11, 12, 16, and 17);
- Contracts and negotiation files with healthcare payors, including those with MFNs (Requests 1, 2, 3, 4, 5, 6, 15, 20, 21, and 22);
- Communications, if any, between the hospital and the U.S. Department of Justice regarding this litigation or MFNs generally (Request 19);
- The hospital's costs and need for rate increases and how healthcare payor rates relate to the cost of health insurance products (Requests 7, 9, 18, 23, and 24); and
- Comparisons of healthcare payors (Requests 6, 8, 13, 14, and 15).<sup>21</sup>

Documents concerning where the hospital draws patients from, what hospitals are identified as competitors, the hospital's contracting and negotiations with healthcare payors, how the hospital sets prices and accounts for the costs of providing care, and how the hospital's costs relate to

---

<sup>21</sup> See Subpoena to St. Catherine, attached as Ex. 3; January 25, 2012 letter from P. Green to C. Metnick, attached as Ex. 6.

payor rates and the price of insurance products<sup>22</sup> are highly relevant in this matter as they will inform the relevant geographic and product markets.

**1. The documents sought are relevant to assessing plaintiff's alleged geographic markets.**

Facts supporting or undermining the validity of plaintiffs' 17 alleged geographic markets—such as documents showing Indiana hospitals compete with southwestern Michigan's hospitals for patients, their primary and secondary service areas, where their patients reside, and plans and strategies in competing for patients, including Michigan residents—are relevant to assessing a key element of this case. Plaintiffs must prove the geographic markets they have identified include not only where patients actually go for care, but also where patients could practicably go. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999) (citing *Bathke*, 64 F.3d at 346) (“A properly defined geographic market includes potential suppliers who can readily offer consumers a suitable alternative to the defendant's services.”); see *Republic Tobacco Co. v. N. Atl. Trading Co., Inc.*, 381 F.3d 717, 738 (7th Cir. 2004) (“Identifying a geographic market requires both, ‘careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.’”) (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 320-27 (1961)). “The proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers.” *Id.* (citing *Freeman Hosp.*, 69 F.3d at 269) (citing *Flegel v. Christian Hosp.*, 4 F.3d 682 (8th Cir. 1993)). Indeed, to the extent that St. Catherine is a potential alternative for receiving care in southwestern Michigan, it may be part of the relevant geographic markets. See *Doctor's Hosp. of Jefferson v. SE Med. Alliance*, 123 F.3d 301, 312 (5th Cir. 1997) (citing *Federal Trade Comm'n v. Freeman Hosp.*, 69 F.3d 260, 268-69 (8th Cir. 1995)) (“Critically, evidence must be offered demonstrating not just where

---

<sup>22</sup> See St. Catherine Subpoena, Ex. 3.

consumers currently purchase the product, but where consumers could turn for alternative products or sources of the product if a competitor raises prices.”).

The subpoena directs St. Catherine to produce documents with information about service areas and hospital competition. This information is necessary to assess the validity of the alleged geographic market. Although St. Catherine is located outside of Michigan, it has not denied that it serves Michigan residents. Further, it has not argued that Michigan residents are outside its service area. Regardless, *Tenet* makes clear that a hospital’s service area does not necessarily constitute the relevant geographic market. *Tenet*, 186 F.3d at 1053. *See also Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 432 (M.D. Pa. 2003) (“[T]here is voluminous case law holding that a firm’s service area, alone, does not equate to a geographic market.”) *aff’d* 423 F.3d 184, 212 (3d Cir. 2005) (“Absent more, however, a primary service area does not equate to the relevant geographic market.”). St. Catherine’s prior annual discharge rates of Michigan residents does not render the documents sought irrelevant to the geographic market analysis—particularly because its discharge rates include Medicare and Medicaid patients, which are not included in the alleged product and geographic markets. This information, and similar information in the hospital’s possession is, in fact, applicable to an analysis of consumer behavior in choosing medical facilities—which, in turn, informs the geographic market analysis.

**2. The documents sought are relevant to assessing plaintiffs’ alleged product markets.**

Like the alleged geographic markets, plaintiffs’ alleged product markets are improperly defined. Relevant to its defense, Blue Cross seeks to discover economic evidence concerning competition and price. *See Reifert v. South Central Wis. MLS Corp.*, 450 F.3d 312, 318 (7th Cir. 2006) (citing *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir.

2004)) (encouraging the use of economic evidence rather than conclusory assumptions about the state of competition to support market definition).

St. Catherine documents—especially those comparing various healthcare payors, the different rates payors offer, and how those rates affect the hospital’s utilization of any payor—are relevant to the state of competition among healthcare payors. *See HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007) (“[T]he product market can be determined by analyzing how ‘consumers will shift from one product to the other in response to changes in their relative costs.’”) (quoting *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1278 (8th Cir. 1981)).

Furthermore, St. Catherine’s documents reflecting the substitutability of healthcare payors are relevant to whether the alleged product markets are in fact more differentiated than the plaintiffs contend. *See Southeast Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011) (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956)) (“Evidence that consumers will substitute one product for another in response to a slight decrease in price, strongly indicates those products compete in the same product market.”); *see also Kaiser Aluminum & Chemical Corp. v. Fed. Trade Comm’n*, 652 F.2d 1324, 1330 (7th Cir. 1981) (citing *E.I. du Pont de Nemours*, 351 U.S. at 399-400) (“The outer boundaries of a product market are determined by the interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”). For example, if the hospital’s documents show substitutability narrowly among payors’ HMO, PPO, Traditional, and Medicare Supplemental plans but not among its broader commercial group and individual plans, those documents go to the validity of plaintiffs’ alleged product markets. *See id.* (citing *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007)) (“Determining the limits of a relevant product market requires identifying the choices available to customers.”).

**3. That the documents sought may not be admissible at trial is no basis for an objection to producing documents sought by subpoena.**

To the extent St. Catherine objects on the grounds that the subpoena seeks documents without any showing that the documents have some evidentiary value rather than discovery value, and argues that the subpoena seeks documents that are irrelevant or will be inadmissible at trial, that position is without merit. Blue Cross is not required to show the requested documents will be admissible at trial or have some evidentiary value; instead, Blue Cross must show that the documents are relevant as defined by Rule 26(b)(1). *Syposs*, 181 F.R.D at 226; *Richter v. Mutual of Omaha Ins. Co.*, No. 06-Misc.-011, 2006 WL 1277906, at \*2 (E.D. Wis. May 5, 2006). “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *United States v. Approx. \$7,400 in United States Currency*, 274 F.R.D. 646, 647 (E.D. Wis. May 31, 2011) (quoting *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 930 (7th Cir. 2004)) (quoting Fed. R. Civ. P. 26(b)(1)). For the reasons described above, the documents covered by the subpoena are relevant under Rule 26(b)(1) and should be discoverable, without regard to admissibility at trial.

In summary, Blue Cross reasonably believes that St. Catherine has information that may prove or disprove the validity of the parameters defining alleged southwestern Michigan geographic market and the alleged product markets. The information sought is relevant, and St. Catherine should be compelled to produce that information.

**B. There is No Basis for Hospital Objections that the Requests are Overly Broad.**

St. Catherine objects to Blue Cross's subpoena on the grounds that the requests are overly broad. To the contrary, the requests are tailored and specific to the issues in this matter. Blue Cross has made every effort to further clarify the aim and scope of the subpoenaed documents.

And, as described in Section A above, the requests seek only information about matters directly at issue in this case.

Moreover, the requests are limited temporally, from January 1, 2003 to the present, and Blue Cross will agree to further limit its request to documents dated January 1, 2004 to the present (dates consistent with the scope of discovery ordered in the underlying litigation). Furthermore, Blue Cross will not ask St. Catherine to pull documents from storage unless, upon review of documents produced, there is a clear need for a limited, targeted follow-up request.

**C. Objections that the Requests are Unduly Burdensome are Unsubstantiated and Ignore Blue Cross's Efforts to Facilitate Compliance.**

St. Catherine objects to Blue Cross's subpoenas on the grounds that the requests are unduly burdensome. First, St. Catherine says the subpoena imposes undue burden and significant expense but makes no showing of how the subpoena is injurious.<sup>23</sup> A third party seeking to avoid a subpoena "cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena." *Great Lakes Transp. Holding LLC v. Yellow Cab Serv. Corp. of Florida, Inc.*, No. 11-50655, 2011 WL 2533653, at \*1 (E.D. Mich. June 27, 2011) (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2643.1 (1995)). Conclusory statements from St. Catherine, which do not assess the actual burden the subpoena imposes, are not a sufficient basis to avoid the subpoena.

Second, Blue Cross has made every effort to limit any burden to St. Catherine. Blue Cross has engaged in lengthy discussions with the hospital to identify responsive documents. Blue Cross offered the hospital the opportunity to limit its searches to key custodians most likely to have relevant documents and the specific, known, responsive and relevant files held by any

---

<sup>23</sup> See December 14, 2011 email from C. Metnick, Ex. 4.

non-key custodians. Blue Cross also proposed to allow key word searches on active emails, agreeing that the hospital need not search archive tapes or off-site storage. Blue Cross offered to send its own attorney to the hospital's location to search files and copy responsive, non-privileged documents at Blue Cross's expense. Finally, Blue Cross offered to accept a search of files known to have responsive documents and not require a search for "all documents," reserving only the right to ask for documents apparently missing from the produced set.<sup>24</sup> St. Catherine rejected Blue Cross's good faith attempts to limit any burden of responding to its subpoena,<sup>25</sup> although the alleged burden is nothing more than that which arises with any third-party document subpoena contemplated under Rule 45.

In summary, Blue Cross has offered to assist St. Catherine in identifying responsive documents. And as described above, the documents and information sought is particularly relevant to the issues in the litigation, and the importance of the search for the truth concerning the relevant product and geographic markets outweighs the limited burden presented here. The Court should overrule St. Catherine's objections on the grounds of undue burden.

**D. Objections that Documents are Protected by Privilege, Confidential or Proprietary Afford No Basis for the Hospital's Refusal to Produce.**

St. Catherine objects to the subpoena on the grounds that it calls for documents protected by a privilege or immunity allowable by law, or as highly confidential and proprietary in nature.<sup>26</sup> First, Blue Cross does not seek privileged or otherwise protected documents.<sup>27</sup> St.

---

<sup>24</sup> See, January 25, 2012 letter, Ex. 6.

<sup>25</sup> See, January 26, 2012 email from C. Metnick, Ex. 5.

<sup>26</sup> December 14, 2011 email from C. Metnick, Ex. 4; January 26, 2012 email from C. Metnick, Ex. 5.

<sup>27</sup> See Subpoena for St. Catherine, Ex. 3; see also Fed. R. Civ. P. 45(c)(3)(A)(iii) (allowing courts to quash a third-party subpoena if it requires disclosure of privileged information and no waiver or exception applies).

Catherine, however, has produced no documents whatsoever. It is unlikely that all responsive documents sought are privileged or otherwise protected. Moreover, Blue Cross has conferred with St. Catherine, plainly stating it is not seeking privileged material, and the hospital is free to make accommodations to protect privileged information while still complying with the subpoena.

Second, Blue Cross understands the hospital's concerns about releasing highly confidential and proprietary information. There is, however, a Protective Order in place that addresses the same concern among the Parties.<sup>28</sup> The Protective Order expressly protects the hospital's confidential or proprietary information and limits the release of any sensitive material.<sup>29</sup> Similar orders exist in the private actions.<sup>30</sup>

---

<sup>28</sup> See Stip. Protective Order Concerning Confidentiality, Doc. 36, *United States v. Blue Cross Blue Shield of Mich.*, 2:10-cv-14155-DPH-MKM (E.D. Mich. filed Mar. 16, 2011) (protecting the Parties' and non-parties confidential information from improper disclosure or use), attached as Ex. 7.

<sup>29</sup> The Parties to the underlying case have submitted a stipulated Protective Order amending the current order to more explicitly provide for the protection of HIPAA-related information (attached as Ex. 8). Finally, these same parties, along with the parties to two other related cases pending in the Eastern District of Michigan, are seeking to agree to a global protective order applies to all the Blue Cross MFN cases.

<sup>30</sup> Stipulated Protective Order Concerning Confidentiality, Doc. 16, *Aetna v. Blue Cross Blue Shield of Mich.*, 2:11-cv-15346-DPH-MKM (E.D. Mich.); Stipulated Protective Order Concerning Confidentiality, Doc. 47, *The Shane Group, Inc., et al v. Blue Cross Blue Shield of Mich.*, 2:10-cv-14360-DPH-MKM (E.D. Mich.); Stipulated Protective Order Concerning Confidentiality, Doc. 40, *Mich. Reg. Council of Carpenters Employee Benefits Fund, et al v. Blue Cross Blue Shield of Mich.*, 2:10-cv-14887-DPH-MKM (E.D. Mich.).

### III. CONCLUSION

For the reasons stated above, Blue Cross respectfully requests that this Court grant its Motion to Compel St. Catherine to produce documents responsive to its Rule 45 subpoena issued on October 7, 2011.

Dated: May 11, 2012

Respectfully submitted,

/s/   
Douglas A. Henning  
ICE MILLER LLP  
200 W. Madison Street  
Suite 3500  
Chicago, IL 60606-3417  
(312) 726-1567

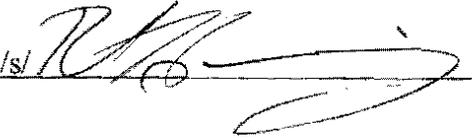
Joseph A. Fink (MI Bar No. P13428)  
Michelle L. Alamo (MI Bar No. P60684)  
Patrick B. Green (MI Bar No. P68759)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, MI 48226  
(313) 223-3148

Todd M. Stenerson (MI Bar No. P51953)  
D. Bruce Hoffman (DC Bar No. 495385)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037  
(202) 955-1500

*Counsel for Defendant Blue Cross  
Blue Shield of Michigan*

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury that on May 11, 2012 he caused to be served a copy of the foregoing DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S MOTION TO COMPEL RESPONSES TO SUBPOENAS FOR DOCUMENTS on all counsel of record in accordance with this Court's policies and procedures for service of electronically filed documents.

/s/ 

DETROIT 19276-135 1247011v1

**EXHIBIT 1**

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

_____ )	
UNITED STATES OF AMERICA and the )	
STATE OF MICHIGAN, )	
)	
) Plaintiffs, )	
)	
) v. )	Civil Action No.
)	
BLUE CROSS BLUE SHIELD OF )	COMPLAINT
MICHIGAN, a Michigan nonprofit )	
healthcare corporation, )	
)	
) Defendant. )	
_____ )	

The United States of America, acting under the direction of the Attorney General of the United States, and the State of Michigan, acting under the direction of the Michigan Attorney General, bring this civil antitrust action to enjoin defendant Blue Cross Blue Shield of Michigan (“Blue Cross”) from including “most favored nation” clauses (“MFNs”) in its contracts with hospitals in Michigan, to enjoin the enforcement of such clauses by Blue Cross, and to remove those clauses from existing contracts.

Blue Cross’ use of MFNs has reduced competition in the sale of health insurance in markets throughout Michigan by inhibiting hospitals from negotiating competitive contracts with Blue Cross’ competitors. The MFNs have harmed competition by (1) reducing the ability of other health insurers to compete with Blue Cross, or actually excluding Blue Cross’ competitors in certain markets, and (2) raising prices paid by Blue Cross’ competitors and by self-insured employers. By reducing competition in this manner, the MFNs are likely raising prices for health

insurance in Michigan. The MFNs unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Michigan Antitrust Reform Act, MCL 445.772.

## **I. NATURE OF THIS ACTION**

1. Blue Cross is by far the largest provider of commercial health insurance in Michigan and has been for many years. Blue Cross competes with for-profit and nonprofit health insurers. Blue Cross' commercial health insurance policies cover more than three million Michigan residents, more than 60% of the commercially insured population. Blue Cross insures more than nine times as many Michigan residents as its next largest commercial health insurance competitor. Blue Cross had revenues in excess of \$10 billion in 2009. Blue Cross has market power in the sale of commercial health insurance in each of the relevant geographic markets alleged below.

2. Blue Cross is also the largest non-governmental purchaser of health care services, including hospital services, in Michigan. As part of its provision of health insurance, Blue Cross purchases hospital services on behalf of its insureds from all 131 general acute care hospitals in the state. Blue Cross purchased more than \$4 billion in hospital services in 2007.

3. Over the past several years, Blue Cross has sought to include MFNs (sometimes called "most favored pricing," "most favored discount," or "parity" clauses) in many of its contracts with hospitals. Blue Cross currently has agreements containing MFNs or similar clauses with at least 70 of Michigan's 131 general acute care hospitals. These 70 hospitals operate more than 40% of Michigan's acute care hospital beds. Unless enjoined, Blue Cross is likely to enter into MFNs with additional Michigan hospitals.

4. Blue Cross generally enters into two types of MFNs, which require a hospital to provide hospital services to Blue Cross' competitors either at higher prices than Blue Cross pays or at prices no less than Blue Cross pays. Both types of MFNs inhibit competition:

(A) "MFN-plus." Blue Cross' existing MFNs include agreements with 22 hospitals that require the hospital to charge some or all other commercial insurers *more* than the hospital charges Blue Cross, typically by a specified percentage differential. These hospitals include major hospitals and hospital systems, and all of the major hospitals in some communities. These 22 hospitals operate approximately 45% of Michigan's tertiary care hospital beds. (A tertiary care hospital provides a full range of basic and sophisticated diagnostic and treatment services, including many specialized services.) Blue Cross' MFN-plus clauses require that some hospitals charge Blue Cross' competitors as much as 40% more than they charge Blue Cross. Two hospital contracts with MFN-plus clauses also prohibit giving Blue Cross' competitors better discounts than they currently receive during the life of the Blue Cross contracts. Blue Cross' MFN-plus clauses guarantee that Blue Cross' competitors cannot obtain hospital services at prices comparable to the prices Blue Cross pays, which limits other health insurers' ability to compete with Blue Cross. Blue Cross has sought and, on most occasions, obtained MFN-plus clauses when hospitals have sought significant rate increases.

(B) "Equal-to MFNs." Blue Cross has entered into agreements containing MFNs with more than 40 small, community hospitals, which typically are the only hospitals in their communities, requiring the hospitals to charge other commercial health

insurers at least as much as they charge Blue Cross. Under these agreements, Blue Cross agreed to pay more to community hospitals, which Blue Cross refers to as “Peer Group 5” hospitals, raising Blue Cross’ own costs and its customers’ costs, in exchange for the equal-to MFN. A community hospital that declines to enter into these agreements would be paid approximately 16% less by Blue Cross than if it accepts the MFN. Blue Cross has also entered into equal-to MFNs with some larger hospitals.

5. Blue Cross has sought and obtained MFNs in many hospital contracts in exchange for increases in the prices it pays for the hospitals’ services. In these instances, Blue Cross has purchased protection from competition by causing hospitals to raise the minimum prices they can charge to Blue Cross’ competitors, but in doing so has also increased its own costs. Blue Cross has not sought or used MFNs to lower its own cost of obtaining hospital services.

6. Blue Cross’ MFNs have caused many hospitals to (1) raise prices to Blue Cross’ competitors by substantial amounts, or (2) demand prices that are too high to allow competitors to compete, effectively excluding them from the market. By denying Blue Cross’ competitors access to competitive hospital contracts, the MFNs have deterred or prevented competitive entry and expansion in health insurance markets in Michigan, and likely increased prices for health insurance sold by Blue Cross and its competitors and prices for hospital services paid by insureds and self-insured employers, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Michigan Antitrust Reform Act, MCL 445.772.

## **II. DEFENDANT, JURISDICTION, VENUE, AND INTERSTATE COMMERCE**

7. Defendant Blue Cross is a Michigan nonprofit healthcare corporation headquartered in Southfield, Michigan. Blue Cross is subject to federal taxation but is exempt from

state and local taxation under Michigan law. Directly and through its subsidiaries, Blue Cross provides commercial and other health insurance products, including preferred provider organization ("PPO") health insurance products and health maintenance organization ("HMO") health insurance products.

8. Plaintiff the United States brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain Blue Cross' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiff the State of Michigan, by and through its attorney general, brings this action in its sovereign capacity and as *parens patriae* on behalf of the citizens, general welfare, and economy of Michigan under its statutory, equitable and/or common law powers, and pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain Blue Cross' violation of Section 2 of the Michigan Antitrust Reform Act, MCL 445.772.

9. The State of Michigan purchases group health insurance for approximately 52,000 employees and 180,000 retirees and dependents, including residents of each of the areas directly affected by Blue Cross' conduct. In particular, the State purchases health insurance for its employees from Blue Cross and others, and 60% of State employees and nearly all State retirees are covered by Blue Cross health plans. State employees covered by Blue Cross are self-insured by the State, as described in paragraph 15 below, and increases in hospital costs are borne directly by the State and its employees. The State has been injured, and is likely to be injured, in its business and property as a result of Blue Cross' violations.

10. This Court has subject matter jurisdiction over this action and jurisdiction over the defendant pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4 (as to claims by the United

States), Section 16 of the Clayton Act, 15 U.S.C. § 26 (as to claims by the State of Michigan), 28 U.S.C. §§ 1331, 1337(a) and 1345, and principles of pendent and ancillary jurisdiction.

11. Blue Cross is engaged in interstate commerce and in activities substantially affecting interstate commerce, and the conduct alleged herein substantially affects interstate commerce. Among other things, increased prices for hospital services caused by Blue Cross' MFNs are, in some cases, paid by health insurers and self-insured employers across state lines. Blue Cross provides commercial health insurance that covers Michigan residents when they travel across state lines, purchases health care in interstate commerce when Michigan residents require health care out of state, and receives payments from employers outside Michigan on behalf of Michigan residents.

12. Blue Cross maintains its principal place of business and transacts business in this District, and is subject to the personal jurisdiction of this Court. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22. Blue Cross developed its MFN policy in substantial part in this District, and entered into contracts containing MFNs with hospitals in this district and elsewhere. Blue Cross' conduct has raised and threatens to raise hospital prices and has likely raised health insurance prices in this District and elsewhere.

### **III. COMMERCIAL HEALTH INSURANCE IN MICHIGAN**

13. In Michigan, as throughout the United States, individuals who are not disabled, elderly, or indigent, and therefore eligible for Medicare or Medicaid, typically obtain health insurance from commercial health insurance companies. Employed individuals most often obtain health insurance through their employers, which typically pay the greater share of insurance premiums. In 2008, approximately 53% of Michigan residents obtained employer-

provided or other group health insurance. About 7% obtained individual insurance directly from commercial insurance companies, including Blue Cross.

14. Commercial health insurers compete to be chosen by employers and employees based on the quality and breadth of their health care provider networks, the level of benefits provided to employees (including employees' out-of-pocket costs in the form of deductibles, co-payments, and coinsurance), price, customer service, reputation, and other factors. Employers and some other groups typically select the insurance plan or plans they offer to their employees or group members. Employees or group members then choose whether to enroll in the group health insurance coverage offered to them and, if multiple health insurance plans are offered, choose among the plans offered.

15. Employers provide group health insurance on either a "fully insured" or a "self-insured" (sometimes called "self-funded") basis. Under fully insured health insurance policies, the insurer bears the risk that health care claims will exceed anticipated losses. Under self-insured health insurance policies, the employer pays its employees' insured medical costs itself, so a large portion of that risk is borne by the employer (often subject to stop-loss insurance). Self-insurance is a viable option primarily for large employers. Employers that self-insure usually contract with a health insurance company to obtain access to a health care provider network, including hospitals and physicians, at favorable prices, and for administrative services such as claims processing. The health insurers that provide these network access and administrative services, known in the industry as "administrative services only" ("ASO") arrangements, for self-insured employers with employees in a particular region are generally the same insurers that provide fully insured health insurance in that region. Blue Cross is the largest

provider of ASO services in Michigan, including to plaintiff State of Michigan, as alleged in paragraph 9 above. Blue Cross processed almost \$11 billion in health care claims for self-insured employers in 2009. Approximately half of Blue Cross' commercial health insurance business is self-insurance business. Blue Cross earned more than \$750 million in ASO fees in 2009.

16. Most commercial health insurance plans provide insureds with access to a health care provider network including hospitals and physicians. Under these plans, insureds receive greater benefits when obtaining health care services from providers that participate in the insurer's provider network. When an insured receives service from a provider in the insurer's network, the insurer or self-insured employer pays the health care provider at prices and terms negotiated between the insurer and the provider, and the patient often pays a co-pay, a deductible, or a portion of the cost specified in the insurance policy. Network contracts between insurers and providers typically prohibit the provider from "balance billing" (charging the patient more than the allowable amount agreed to between the insurer and the provider). In contrast, if there is no network or participation agreement between the insurer and the provider, the insurer typically provides a smaller "out-of-network" insurance benefit, if any, and the insured is often responsible for paying the balance of the provider's full charges. The costs of medical care are typically 80% or more of insurers' costs, and hospital costs are a substantial portion of medical care costs. Accordingly, insurers' hospital costs are an important element of insurers' ability to offer competitive prices and attract employers.

17. Hospitals and commercial health insurers generally negotiate a discount to be applied to a standardized hospital fee schedule. The standardized schedule could be set forth as a

master list of hospital fees for services (referred to in the industry as a “chargemaster”), a schedule of fees for treatment of a particular illness (typically based on “diagnosis-related groups” or “DRGs” as defined by Medicare and Medicaid), or on another basis. Blue Cross’ equal-to MFNs typically require that hospitals not grant other commercial health insurers better discounts from the fee schedules than Blue Cross receives. Blue Cross’ MFN-plus typically require that hospitals not grant other commercial health insurers discounts within a specified percentage of Blue Cross’ discounts.

18. The price of hospital services at individual hospitals directly affects health insurance premiums for the customers that use those hospitals. Under Michigan law, Blue Cross is allowed to base large employers’ group premiums on the group’s own health care cost experience, so increases in local hospital prices can lead directly to increased premiums. Blue Cross is allowed to base its insurance premiums for individuals and small employers (with 50 or fewer employees) on Blue Cross’ health care expense experience within geographic areas defined by Blue Cross, among other factors. As a result, an increase in the price of local hospital services directly increases the premiums that Blue Cross charges to purchasers of individual or small-group policies in that area. As Blue Cross recognizes, “any increase in our hospital reimbursement rates would have to be passed on in the form of higher premiums for our insured customers, and dollar for dollar increases for those that are self-insured.” Some other health insurers in Michigan also adjust premiums based on the employer’s past and anticipated health care costs – which incorporate local hospital costs. Self-insured employers bear the burden of higher hospital prices directly.

#### **IV. RELEVANT MARKETS**

19. As alleged below, Blue Cross has market power in the sale of commercial health insurance to groups and individuals in relevant geographic markets throughout Michigan. Commercial health insurance excludes government programs such as Medicare and Medicaid, and other products offered by health insurers such as Medicare Advantage that are not available to individuals who do not qualify for Medicare or Medicaid. Commercial health insurance includes self-insurance arrangements described in paragraph 15 above.

##### **A. Relevant Product Markets**

20. The sale of commercial group health insurance, including access to a provider network, is a relevant product market. Health insurers compete on the breadth and quality of their provider networks, on premiums, and on the customer's cost of using providers, among other factors. Group health insurance sold in Michigan usually includes access to a provider network, and most employers and insureds consider an insurer's provider network to be an important element of a health insurance product because the network specifies the physicians and hospitals to which patients can turn for service with substantially lower costs to themselves.

21. There are no reasonable alternatives to group health insurance, including access to a provider network, for employers or for most employees. Individual health insurance typically is significantly more expensive than group health insurance, in part because employer contributions to group health insurance premiums are not taxable to the employee and are tax-deductible by the employer. Virtually all individual health insurance is purchased by persons who do not have access to employer-sponsored group health insurance.

22. The sale of commercial individual health insurance, including access to a provider

network, is also a relevant product market. Some Michigan residents without access to group health insurance purchase individual health insurance from commercial health insurers. Individual health insurance is the only product available to individuals without access to group coverage or government programs that allows them to reduce the financial risk of adverse health conditions and to have access to health care at the discounted prices negotiated by commercial health insurers. There are no reasonable alternatives to individual health insurance for individuals who lack access to group health insurance or government programs such as Medicare and Medicaid.

23. Purchasing hospital services directly, rather than through a commercial insurer, is typically prohibitively expensive and is not a viable substitute for group or individual commercial health insurance. Patients without health insurance almost never purchase hospital services directly from hospitals at prices comparable to prices paid by Blue Cross.

24. Blue Cross' MFNs apply to hospital services procured for both group and individual commercial health insurance plans, and the anticompetitive effects alleged below have affected and will continue to affect purchasers of both group and individual commercial health insurance. Group and individual commercial health insurance are referred to herein as "commercial health insurance."

**B. Relevant Geographic Markets**

25. Markets for commercial health insurance, including access to a provider network, are local. As alleged in paragraph 16 above, one key component of commercial health insurance is access to a provider network, including primary and tertiary care hospitals. Because patients typically seek medical care close to their homes or workplaces, they strongly prefer health

insurance plans that provide access to networks of hospitals and physicians close to their homes and workplaces. Employers offering group health insurance to their employees therefore demand insurance products that provide access to health care provider networks, including primary and tertiary care hospitals, in the areas in which substantial numbers of their employees live and work. Individuals purchasing individual health insurance likewise demand insurance products that provide access to health care provider networks, including hospitals, in the areas in which they live and work.

26. The relevant geographic market for the purpose of analyzing the effect of an MFN between Blue Cross and a hospital on the sale of commercial health insurance is the area in which the seller operates and in which the purchaser can practicably turn for supplies or services. Because an insurer is selling access to a provider network, among other things, the relevant geographic market for analyzing the effect of an MFN between Blue Cross and a hospital on the sale of commercial health insurance is the area in which the hospital subject to the MFN operates and in which employers and insureds can practicably turn for hospitals included in the provider network offered for sale as part of a commercial health insurance product.

27. For example, the relevant geographic market for analyzing the effect of the MFN between Blue Cross and Edward W. Sparrow Hospital ("Sparrow"), in Lansing, is the Lansing Metropolitan Statistical Area ("MSA"). Lansing area employers and insureds cannot practicably turn to commercial health insurers that do not offer network access to hospitals in the Lansing MSA. (MSAs and Micropolitan Statistical Areas are geographic areas defined by the U.S. Office of Management and Budget.)

28. The following geographic areas are relevant geographic markets for the sale of

commercial health insurance:

- a. The western and central Upper Peninsula (Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Ontonagon, and Schoolcraft Counties), where Blue Cross has more than 65% of commercially insured lives;
- b. The Lansing MSA (Ingham, Clinton and Eaton Counties), where Blue Cross has approximately 70% of commercially insured lives;
- c. The Alpena area (Alpena and Alcona Counties), where Blue Cross has more than 80% of commercially insured lives;
- d. The Traverse City Micropolitan Statistical Area (Benzie, Grand Traverse, Kalkaska and Leelanau Counties), where Blue Cross has more than 60% of commercially insured lives;
- e. The "Thumb" area (Huron, Sanilac and Tuscola Counties), where Blue Cross has more than 75% of commercially insured lives;
- f. Each of the Detroit, Flint, Kalamazoo, and Saginaw MSAs, and the Alma and Midland Micropolitan Statistical Areas, in each of which Blue Cross has more than 50% of commercially insured lives;
- g. The Grand Rapids MSA, where Blue Cross has more than 45% of commercially insured lives; and
- h. Each of Allegan, Iosco, Montcalm, Osceola and St. Joseph Counties, in each of which Blue Cross has more than 40% of commercially insured lives.

29. Blue Cross has an MFN with at least one significant hospital in each geographic market identified in paragraph 28 above. In the western and central Upper Peninsula, and in the

Lansing, Detroit, Flint, Grand Rapids, Kalamazoo and Saginaw MSAs and the Alma and Midland Micropolitan Statistical Areas, Blue Cross has MFN-pluses with at least one significant tertiary care hospital. In the Thumb and in Allegan, Iosco, Montcalm, Osceola and St. Joseph counties, Blue Cross has MFNs with all of the hospitals, all of which are community hospitals, in the market.

30. The geographic markets identified in paragraph 28 above approximate the areas served by the hospitals currently subject to Blue Cross' MFNs, and approximate the areas in which a commercial health insurer requires a provider network, including primary and tertiary care hospitals, in order to be an effective competitor in that area. Most employed residents of each of these areas work within the area. Residents of these areas generally tend to use the tertiary care hospitals, if any, within these areas for tertiary care hospital services. Therefore, commercial health insurers believe they must include in their networks tertiary care hospitals in these areas in order to compete effectively in the sale of commercial health insurance to employers and residents of these areas.

31. In addition, commercial health insurers believe they must include community hospitals within these areas in order to be able to compete effectively in the sale of commercial health insurance to employers and residents of these areas. Blue Cross' competitors have paid higher prices at community hospitals in these areas as a result of Blue Cross' MFNs, rather than drop the community hospitals from their networks. In particular, commercial health insurers that offer any HMO product are required by Michigan insurance regulations to include in their HMO networks nearby hospitals for any location in which an HMO product is offered. Those hospitals include community hospitals that are the only hospitals in certain of the areas identified in

paragraph 28 above. Several of the health insurers seeking to compete with Blue Cross primarily offer HMO products, and approximately 40% of Michigan insureds covered by non-Blue Cross commercial health insurance participate in HMOs.

32. The residents of the markets identified in paragraph 28 above, and their employers, are the customers most likely to be affected by Blue Cross' MFNs. Employers and individuals likely would not reduce purchases of commercial health insurance from commercial health insurers with provider networks in the geographic markets alleged in paragraph 28 above in response to prices above competitive levels by a sufficient amount to make prices above competitive levels over a sustained period of time unprofitable for a monopoly supplier of commercial health insurance in those markets. Therefore, the sale of commercial health insurance, including a provider network, in each of the geographic markets alleged above is a properly defined relevant market for the purpose of analyzing the effects of Blue Cross' MFNs under the antitrust laws.

#### **V. BLUE CROSS' MARKET POWER**

33. Blue Cross has market power in the sale of commercial health insurance in each of the alleged relevant geographic markets. Blue Cross is far and away the largest provider of health insurance in Michigan, with more than 60% of commercially insured lives (including lives covered under self-insurance arrangements administered by Blue Cross). Market shares of the magnitude alleged in paragraph 28 above create an inference of market power.

34. The inference of Blue Cross' market power arising from its market share is corroborated by Blue Cross' demonstrated ability to exercise that market power by, among other things, raising prices, restricting output, erecting barriers to entry, and excluding competitors, as

alleged below.

35. Blue Cross' market power in each of the alleged markets is durable because entry into the alleged markets is difficult. Effective entry into or expansion in commercial health insurance markets requires that a health insurer contract with broad provider networks and obtain hospital prices and discounts at least comparable to the market's leading incumbents. As alleged below, the purpose and effect of Blue Cross' MFNs is to prevent competing insurers and potential entrants from obtaining discounts from hospitals that would allow them to compete more effectively with Blue Cross.

## **VI. BLUE CROSS' MFNs AND THEIR ANTICOMPETITIVE EFFECTS**

### **A. The MFNs and their Terms**

36. Since at least 2007, Blue Cross has sought to include MFNs or similar clauses in many of its agreements with Michigan hospitals. In some contracts, Blue Cross requires the hospital to contract with any other commercial insurer at rates at least as high as the hospital contracts with Blue Cross – an equal-to MFN. In others, Blue Cross demands even more and requires the hospital to contract with other insurers at rates *higher* than those paid by Blue Cross, typically by a specified percentage differential – an MFN-plus. Some Blue Cross MFNs contain very limited exceptions, most notably an exception for commercial health insurers with a *de minimis* presence, as discussed in paragraph 47 below.

37. Blue Cross currently has MFNs in its contracts with more than half of Michigan's general acute care hospitals. Very few hospitals have refused Blue Cross' demands for an MFN. Other hospitals' contracts have not been renegotiated in recent years, but Blue Cross is likely to seek MFNs when its contracts with those hospitals come up for renegotiation, especially if the

hospital requests a price increase.

38. Most of Blue Cross' MFNs require the hospital to "attest" or "certify" annually to Blue Cross that the hospital is complying with the MFN, and they often give Blue Cross the right to audit compliance. Insurers pay hospitals under different formulas, as discussed in paragraph 17 above. These varying payment methodologies can cause uncertainty for a hospital comparing Blue Cross' effective payment rates with anticipated payment rates from different insurers. Therefore, a hospital seeking to avoid a payment reduction by Blue Cross – generally its largest commercial payer – sometimes contracts with Blue Cross' competitors at prices even higher than the MFN requires, to avoid being penalized if Blue Cross audits the hospital's compliance with the MFN.

39. Blue Cross' agreements with at least 22 Michigan hospitals contain MFN-plus clauses. These hospitals are among the most important providers of hospital services in their respective areas. The following hospitals or hospital systems have agreements with Blue Cross with MFN-plus clauses:

a. Marquette General Hospital, the largest hospital in the Upper Peninsula and the only Upper Peninsula hospital providing tertiary care, where Blue Cross' contract requires the hospital to charge Blue Cross' competitors at least 23% more than the hospital charges Blue Cross.

b. Sparrow Hospital, the largest hospital in Lansing, where Blue Cross' contract requires the hospital to charge some of Blue Cross' significant competitors at least 12.5% more than the hospital charges Blue Cross.

c. Ascension Health, Michigan's largest hospital system, which owns nine

general acute care hospitals subject to an MFN-plus, including the St. John Providence Health System in the Detroit MSA (five hospitals), Borgess Health in the Kalamazoo MSA, Genesys Regional Medical Center in the Flint MSA, St. Mary's Medical Center in Saginaw, and St. Joseph Health System in Tawas City. Blue Cross' contract with Ascension requires that Ascension's hospitals charge Blue Cross' competitors at least 10% more than the hospitals charge Blue Cross. Blue Cross agreed to pay Ascension higher rates for hospital services, resulting in Blue Cross' paying an additional \$2.5 million annually for this MFN-plus.

d. Both hospitals in Saginaw – Covenant, where Blue Cross' contract requires the hospital to charge most of Blue Cross' competitors at least 39% more than the hospital charges Blue Cross, and St. Mary's, identified in subparagraph c. above.

e. Three Beaumont Hospitals in the Detroit MSA (Royal Oak, Troy and Grosse Pointe), where Blue Cross' MFN requires the hospital to charge Blue Cross' significant competitors at least 25% more than they charge Blue Cross.

f. Two Mid-Michigan Health Hospitals (Midland and Gratiot), where Blue Cross' MFN requires the hospitals to charge Blue Cross' competitors at least 14% more than the hospital charges Blue Cross.

g. Metro Health Hospital in Grand Rapids, where Blue Cross' MFN requires the differential between Blue Cross and other payers to increase over time, to 5% for HMOs and 10% for PPOs.

h. Alpena Regional Medical Center in Alpena, Botsford Hospital in Farmington Hills, Dickinson Memorial Hospital in Iron Mountain, and Munson Medical Center in

Traverse City.

40. In 2007, Blue Cross entered into a “Participating Hospital Agreement” (“PHA”) containing an equal-to MFN with each of more than 40 hospitals it classifies as “Peer Group 5” hospitals: small, rural community hospitals, which are often the only hospital in their communities. Under that agreement, Blue Cross committed to pay more to those community hospitals that agreed to charge all other commercial insurers rates that would be at least as high as those paid by Blue Cross. Any community hospital that failed to attest compliance with the MFN would be penalized by payments from Blue Cross at least 16% less than if it complied with the MFN.

**B. Anticompetitive Effects of Blue Cross’ MFNs**

41. Blue Cross’ existing MFNs, and the additional MFNs that Blue Cross is likely to seek to include in future agreements with Michigan hospitals, have unreasonably lessened competition and are likely to continue to lessen competition by:

- a. Maintaining a significant differential between Blue Cross’ hospital costs and its rivals’ costs at important hospitals, which prevents those rivals from lowering their hospital costs and becoming more significant competitive constraints to Blue Cross;
- b. Raising hospital costs to Blue Cross’ competitors, which likely reduces those competitors’ ability to compete against Blue Cross;
- c. Establishing a price floor below which important hospitals would not be willing to sell hospital services to other commercial health insurers and thereby deterring cost competition among commercial health insurers;
- d. Raising the price floor for hospital services to all commercial health insurers

and, as a result, likely raising the prices for commercial health insurance charged by Blue Cross and its competitors; and

e. Limiting the ability of other health insurers to compete with Blue Cross by raising barriers to entry and expansion, discouraging entry, likely raising the price of commercial health insurance, and preserving Blue Cross' leading market position.

42. Blue Cross often receives substantially better discounts for hospital services than other commercial health insurers receive. Blue Cross knows that its discounts provide a competitive advantage against other health insurers. Blue Cross noted in April 2009 that its "medical cost advantage, delivered primarily through its facility [*i.e.*, hospital] discounts, is its largest source of competitive advantage," and earlier stated that its advantages in hospital discounts "have been a major factor in its success in the marketplace."

43. In recent years, Blue Cross became concerned that competition from other insurers was eroding its hospital discount advantage – as it was. Blue Cross therefore sought to preserve its discount advantage by obtaining MFN-plus clauses, with the "expectation . . . that we would not have any slippage in our differential from what we experience today." In other words, rather than seeking lower prices from hospitals, Blue Cross negotiated MFN-plus clauses to maintain its discount differential and prevent potential competitors from obtaining hospital services at prices close to Blue Cross' prices and thereby becoming more significant competitive constraints on Blue Cross. During negotiations in 2008 with one hospital in Grand Rapids, Blue Cross wrote that "we need to make sure they [the hospital] get a price increase from Priority if we are going to increase their rates."

44. In most cases, Blue Cross obtained an MFN from a hospital by agreeing to increase

its payments to the hospital. Blue Cross has sought and, on most occasions, obtained MFN-plus clauses when hospitals have sought significant rate increases. Blue Cross also agreed to increase rates to Peer Group 5 hospitals as part of the Peer Group 5 PHA, which included an equal-to MFN. Had a hospital not agreed to an MFN, Blue Cross likely would not have agreed to pay the higher rates sought by the hospital. Thus, the likely effect of the MFN has been to raise the prices of hospital services paid by both Blue Cross and its competitors, and by self-insured employers, and to increase health insurance prices charged by Blue Cross and its competitors.

45. Blue Cross' MFNs have resulted and are likely to continue to result in these anticompetitive effects in each of the relevant markets because they effectively create a large financial penalty for hospitals that do not accept them. Blue Cross patients are a significant portion of these hospitals' business, and Blue Cross patients typically are more profitable than Medicare and Medicaid patients, the hospitals' other most significant sources of business. A hospital that would otherwise contract with a competing insurer at lower prices than it charges Blue Cross would have to lower its prices to Blue Cross pursuant to the MFN if it sought to maintain or offer lower prices in contracts with other commercial insurers. The resulting financial penalty discourages a hospital with a Blue Cross MFN from lowering prices to health insurers competing with Blue Cross. Blue Cross' MFNs have caused hospitals to raise prices charged to other commercial health insurers, rather than lower prices to Blue Cross.

46. Prior to Blue Cross' obtaining MFNs, some hospitals gave greater discounts to some other commercial health insurers than they gave to Blue Cross. Without Blue Cross' MFNs, some hospitals had an incentive to offer lower prices to other insurers seeking to enter or expand in the hospital's service area and increase competition in the sale of commercial health insurance.

47. Some Blue Cross MFNs allow for *de minimis* exceptions to the MFN. For example, Blue Cross' MFN with Sparrow Hospital applies to a "significant non-governmental payor . . . whose charges exceed 1.0% of [Sparrow's] total gross patient service charges." The hospital can charge lower prices to an insurer that does not cross the *de minimis* threshold. An increase in that insurer's business at the hospital, however, would trigger the MFN and subject the prices the insurer pays Sparrow to the MFN's threshold. Blue Cross' contract with Beaumont Hospitals has similar provisions. A clause of this type is likely to have the anticompetitive effect of limiting the growth of commercial health insurers with small shares and more favorable discounts than Blue Cross.

48. Blue Cross' use of MFNs has caused anticompetitive effects in the markets for commercial health insurance in the geographic markets discussed below, among others. Hospitals in these markets have raised prices to some commercial health insurers, and declined to contract with other commercial health insurers at competitive prices. As a result, commercial health insurers that likely would have entered local markets to compete with Blue Cross have not done so, or have competed less effectively than they would have without the MFNs. Blue Cross' MFNs therefore have helped Blue Cross maintain its market power in those markets. The actual anticompetitive effects alleged below illustrate the types of competitive harm that have occurred and are likely to occur where Blue Cross obtains MFNs from hospitals throughout Michigan.

### ***1. Marquette and the Upper Peninsula***

49. In 2008, Blue Cross entered into a provider agreement with Marquette General Hospital that contained an MFN-plus requiring Marquette General to charge other insurers at least 23% more than it charges Blue Cross – a cost differential that would severely limit a

competitor's ability to compete with Blue Cross. Blue Cross agreed to pay significantly higher prices for hospital services at Marquette General in exchange for an MFN-plus.

50. Blue Cross is by far the largest commercial health insurer in the Marquette area and in the Upper Peninsula, with more than 65% of the commercially insured population of the eleven counties of the western and central Upper Peninsula (identified in paragraph 28.a above). Blue Cross views the Upper Peninsula as a strategically important region, and believes that "no competitor of size exists in the UP as of today." Blue Cross raised its health insurance premiums in the Upper Peninsula by 250% from 1999 to 2004, "well out of proportion to the rest of the state," according to a Blue Cross document.

51. Marquette General, a 315-bed tertiary care hospital, is the largest hospital and the only tertiary care hospital in Michigan's Upper Peninsula. Marquette General offers more complex surgeries (such as neurosurgery and cardiac surgery), trauma care, and other services that are not available at any other hospital in the Upper Peninsula. The closest tertiary care hospital to Marquette is in Green Bay, Wisconsin, 178 miles away; the closest tertiary care hospital in Michigan is in Petoskey, in the northern Lower Peninsula, 203 miles away.

52. Because a commercial health insurer must provide its subscribers with reasonable access to tertiary hospital care to be able to market a health insurance product, commercial health insurers that seek to market a competitive health insurance plan in the central and western Upper Peninsula must contract with Marquette General at prices that are competitive with Blue Cross' prices. The MFN prevents Marquette General from contracting with other commercial health insurers at prices competitive with Blue Cross' hospital prices.

53. There are several small, community hospitals in the Upper Peninsula. These

hospitals – particularly those in the central and western portions of the Upper Peninsula – generally refer their more complex cases to Marquette General. Eleven of the thirteen smaller hospitals in the Upper Peninsula – Baraga County Memorial in L’Anse, Bell Memorial in Ishpeming, Grand View Health in Ironwood, Helen Newberry Joy in Newberry, Iron County Community in Iron River, Aspirus Keewenaw in Laurium, Mackinac Straits in St. Ignace, Munising Memorial in Munising, Ontonagon Memorial in Ontonagon, Portage Health in Hancock, and Schoolcraft Memorial in Manistique – are Peer Group 5 hospitals and are subject to the equal-to MFN in Blue Cross’ Peer Group 5 PHA.

54. The only hospitals in the Upper Peninsula that do not currently have MFNs in their contracts with Blue Cross are Chippewa County War Memorial Hospital in Sault Ste. Marie, 165 miles from Marquette, and OSF St. Francis Hospital in Escanaba. Because of its relatively limited scope of services and distance from Marquette, Chippewa War Memorial is not a good alternative to Marquette General for residents of the western or central Upper Peninsula, where 84% of the Upper Peninsula’s population resides. OSF St. Francis also is not a tertiary care hospital and does not offer the range of services offered by Marquette General. Insurers likely would not market a health plan with a network including Chippewa War Memorial and/or OSF St. Francis, but lacking Marquette General, to residents of the western or central Upper Peninsula.

55. Priority Health, a Michigan nonprofit health insurer based in Grand Rapids, sought to enter the market for commercial health insurance in the Upper Peninsula and compete with Blue Cross. Without the Blue Cross MFN-plus, Marquette General would have given Priority a discount that would have allowed Priority to compete with Blue Cross, and Priority would have

marketed and provided commercial health insurance in the Upper Peninsula. However, Marquette General told Priority it would not offer Priority rates less than those required by Blue Cross' MFN-plus. Marquette General accordingly gave Priority a revised offer with a significantly higher rates to comply with Blue Cross' MFN-plus.

56. Priority, which had believed it could compete with Blue Cross and attract business if it contracted with Marquette General at rates comparable to those of Blue Cross, concluded that it could not compete with rates at the Upper Peninsula's principal hospital at the level required by Blue Cross' MFN-plus. Priority therefore declined to contract with Marquette General at the rates required by the MFN, and did not enter the market for commercial health insurance in the Upper Peninsula. As a result, Blue Cross maintained its leading market share in the commercial health insurance market in the central and western Upper Peninsula. Other commercial health insurers, including Assurant and Health Alliance Plan ("HAP"), likely also would have entered into agreements with Marquette General if they had been able to contract with Marquette General at prices comparable to the prices Blue Cross pays to Marquette General.

57. When Blue Cross entered into the MFN-plus with Marquette General, Blue Cross knew that Marquette General was considering entering into contracts with other commercial health insurers. Blue Cross demanded the MFN-plus to prevent competitors from obtaining competitive discounts at Marquette General. Blue Cross believed that its contract with Marquette General would, in Blue Cross' own words, "keep blue lock on U.P."

58. Blue Cross increased the prices it pays other hospitals in the Upper Peninsula to induce the hospitals to agree to MFNs. Blue Cross paid Schoolcraft Memorial a price increase in exchange for accelerating by six months the hospital's commitment to charge all other payers at

least as much as it charged Blue Cross.

59. Blue Cross' MFNs with Peer Group 5 hospitals and with Dickinson County Hospital (a hospital that is also subject to an MFN) prevent these smaller hospitals in the Upper Peninsula from agreeing to lower prices for Blue Cross' competitors. Blue Cross' MFNs with Marquette General and other hospitals in the Upper Peninsula have unreasonably lessened competition in the market for commercial health insurance in the central and western Upper Peninsula.

## *2. The Lansing Area*

60. In June 2009, Blue Cross entered into a ten-year provider agreement with Sparrow Hospital, the largest hospital in the Lansing area. That contract includes an MFN-plus that requires Sparrow to charge other insurers at least 12% more than Blue Cross pays. That contract also provides that Blue Cross would raise its rates to Sparrow by \$5 million per year more than under Blue Cross' standard contract with similar hospitals. This MFN-plus likely will result in a price increase in 2011 to the third largest insurer in Lansing.

61. The two largest – and only tertiary care – hospitals in the Lansing area are Sparrow Hospital and Ingham Regional Medical Center (“IRMC”). Each of these two major hospitals has strengths in different fields. Lansing area employers and employees generally prefer health insurers that can provide network access to (and discounts at) both hospitals. Consequently, each of these hospitals is important to health insurers that seek to offer a provider network in the Lansing area. Without access to both hospitals at competitive rates, insurers cannot offer health insurance plans to Lansing area employers or residents on terms or at premiums that would be competitive with Blue Cross products.

62. Blue Cross is by far the largest commercial health insurer in the Lansing area, with

approximately 70% of insured lives. The three largest commercial health insurers in the Lansing area, which in the aggregate insure 93% of residents with commercial group health insurance in the Lansing area, are Blue Cross, Physicians' Health Plan ("PHP"), which is owned by Sparrow's parent, and McLaren Health Plan, which is owned by McLaren Healthcare Corporation, the owner of IRMC. Each of these three health insurers has competitive discounts at both hospitals.

63. Sparrow and IRMC agreed in 2006 to contract with each others' health plans at favorable, "mutual and equitable" rates, to obtain comparable rates for each of their own health plans at the competing hospital. Consequently, PHP and McLaren are the only health insurers that obtain hospital services in the Lansing area at rates comparable to the rates paid by Blue Cross. Other insurers do not receive competitive prices.

64. Blue Cross' MFN with Sparrow provides that Sparrow's existing agreements with other insurers are grandfathered until January 1, 2011. After that date, Blue Cross' MFN will likely require Sparrow to raise prices to McLaren. The resulting higher costs will reduce McLaren's effectiveness as a competitor to Blue Cross, which will likely reduce competition and raise prices for commercial health insurance in the Lansing area. The MFN with Sparrow also prevents other potential entrants into the Lansing area, such as Priority Health and Health Plus, from entering the market in a manner that would create effective price competition to Blue Cross.

65. Blue Cross also has equal-to MFNs with the three smaller hospitals in the Lansing area: Hayes Green Beach Memorial Hospital in Charlotte, Eaton Rapids Medical Center in Eaton Rapids, and Clinton Memorial Hospital in Saint Johns. The adoption of an MFN caused Eaton Rapids and Hayes Green Beach to increase their prices to Blue Cross' competitors by significant amounts. Blue Cross' MFNs with these smaller hospitals in the Lansing area have

also prevented Blue Cross' competitors from obtaining better rates than Blue Cross at these hospitals. Rather than providing a means to ensure that Blue Cross would pay the lowest prices paid by its competitors, the MFNs had the opposite effect – raising the prices paid by Blue Cross' competitors.

66. Blue Cross' MFNs with Sparrow and other hospitals in the Lansing MSA have unreasonably restrained trade and lessened competition, or will likely do so in the future, in the market for commercial health insurance in the Lansing MSA.

### 3. *The Alpena Area*

67. Alpena Regional Medical Center ("Alpena Regional") is the only tertiary care hospital in Alpena County and in the northeastern Lower Peninsula. The nearest tertiary care hospitals are in Petoskey, 100 miles west, and Bay City, 140 miles south. Alpena Regional is important to health insurers that seek to offer a provider network in the Alpena area. Without access to Alpena Regional at rates competitive with Blue Cross' rates, other insurers cannot offer health insurance plans to Alpena area employers or residents at premiums competitive with Blue Cross products. Currently, the only two commercial health insurers with significant business in the Alpena area are Blue Cross and Priority. Blue Cross has a market share of more than 80% in the Alpena area.

68. In late 2009, Blue Cross and Alpena Regional negotiated a new contract. Blue Cross offered a substantial rate increase "contingent on the formalization of the most favored discount." In addition, Blue Cross sought and obtained a commitment by Alpena Regional that it would not improve the discount given to any other health insurer during the four-year life of the contract – a clause that, according to Blue Cross, "prohibits allowing better discounts to be

negotiated with payors.”

69. Pursuant to the Blue Cross MFN, Alpena Regional reduced Priority’s inpatient discount, which increased the prices Priority pays for inpatient services significantly above the prices Blue Cross pays. The MFN therefore likely resulted in a substantial reduction in competition in the sale of commercial health insurance in the Alpena area.

#### *4. The Traverse City Area*

70. Munson Healthcare owns Munson Medical Center (“Munson”) in Traverse City, Paul Oliver Memorial Hospital in Frankfort, and Kalkaska Memorial Medical Center in Kalkaska, all of which are in the Traverse City Micropolitan Statistical Area. Munson is the only tertiary care hospital in the market, and Paul Oliver and Kalkaska are the only other hospitals in the market. The nearest tertiary care hospital other than Munson is in Petoskey, 66 miles north of Traverse City, and is not a reasonable substitute for Munson for Traverse City residents or for insurers seeking to sell commercial health insurance to residents of the Traverse City area. Munson, Paul Oliver and Kalkaska are each vital to health insurers seeking to offer a provider network in the Traverse City area. Without access to these hospitals at competitive rates, insurers cannot offer health insurance plans to Traverse City area employers or residents at premiums competitive with Blue Cross products.

71. Blue Cross has entered into an agreement with Munson that requires Munson to charge other health insurers more than it charges Blue Cross. Blue Cross has entered into the Peer Group 5 PHA with Paul Oliver and Kalkaska, causing them to charge other health insurers at least as much as they charge Blue Cross. Blue Cross has a market share of more than 60% in the Traverse City area.

72. Paul Oliver and Kalkaska had previously agreed to grant greater discounts to Priority and Aetna than they had granted to Blue Cross. Blue Cross' MFNs caused Paul Oliver and Kalkaska to raise their prices significantly to these Blue Cross' competitors. The price increases substantially reduced Blue Cross' competitors' ability to compete against Blue Cross, which reduced competition in the sale of health insurance in the Traverse City area.

### *5. The Thumb Area*

73. There are eight Peer Group 5 hospitals in the three Thumb Counties (Huron, Sanilac and Tuscola): Caro Community Hospital, Hills and Dales General Hospital, Marlette Regional Hospital, McKenzie Memorial Hospital, Huron Medical Center, Scheurer Hospital, Deckerville Community Hospital, and Harbor Beach Community Hospital. Blue Cross is the largest provider of commercial health insurance, with a market share of more than 75%, in the Thumb area.

74. Each of the hospitals in the Thumb area is important to health insurers seeking to offer a provider network to residents there. Without access to these hospitals at competitive rates, insurers cannot offer health insurance plans to Thumb area employers at premiums that would be competitive with Blue Cross products.

75. Through the Peer Group 5 PHA, Blue Cross sought and obtained MFNs with Thumb area hospitals with "the realization that some of the[m] are giving commercial carriers discounts that are on par with (or better than) what they give [Blue Cross]." Blue Cross sought and obtained the MFN clause with Thumb area hospitals over the concern expressed by one hospital that such a clause would "unquestionably . . . operate to drive up costs to other purchasers." Accordingly, when that hospital accepted the MFN and Blue Cross' higher payments, it raised another commercial health insurer's rates.

76. As Blue Cross had believed, other commercial health insurers had received discounts from Thumb area hospitals that were in some cases better than the discounts obtained by Blue Cross. As a result of the MFN, Thumb area hospitals raised these insurers' rates to levels equal to or greater than the Blue Cross discount rate. The commercial health insurers affected by Blue Cross' MFNs in the Thumb area have paid and are paying higher prices to Thumb area hospitals as a result of the hospitals' agreeing to the MFNs, rather than removing any Thumb area hospitals from their networks. As a result, Blue Cross' MFNs with hospitals in the Thumb area have increased costs to competing insurers and to self-insured employers, and reduced insurers' ability to compete, thereby likely lessening competition in the market for commercial health insurance in the Thumb area.

#### **6. *Community Hospitals***

77. As alleged above, Blue Cross has offered community hospitals a participating hospital agreement, the Peer Group 5 PHA, under which the hospitals would be subject to an equal-to MFN. Most community hospitals have accepted this offer and receive higher payments from Blue Cross in exchange. These agreements between Blue Cross and community hospitals have caused some hospitals to raise prices to other insurers by significant amounts – often by 100% or more. For example:

- a. Bronson LakeView Community Hospital, in Paw Paw, in the Kalamazoo MSA, raised price to a competitor to comply with Blue Cross' MFN.
- b. At least two hospitals in Montcalm County raised price to Blue Cross competitors to comply with Blue Cross' MFNs.
- c. Three Rivers Health Medical Center, in Three Rivers, St. Joseph County,

raised price to four Blue Cross competitors to comply with the MFN.

d. Allegan General Hospital, in Allegan, Allegan County, raised prices to a Blue Cross competitor to comply with Blue Cross' MFN.

e. Spectrum Health Reed City Hospital, in Reed City, Osceola County, raised price to three Blue Cross competitors to comply with the MFN.

78. In each case, the Blue Cross competitor concluded that it needed the community hospital to be able to offer a network that would allow it to compete with Blue Cross, and thus agreed to pay, and is paying, higher hospital prices.

79. As a result, Blue Cross' competitors' hospital costs have increased, likely increasing the premiums those competitors offer for health insurance products in those areas, increasing costs of those competitors' self-insured customers, reducing competition in the sale of health insurance in those areas, and unreasonably restraining trade and lessening competition in the rural areas served by these hospitals.

\* \* \* \* \*

80. The anticompetitive effects alleged in paragraphs 41-80 above illustrate the types of harm that have occurred, and are likely to occur, as a result of Blue Cross' MFNs. These effects have occurred and are likely to occur in the markets discussed in paragraphs 41-80 above, in the Detroit, Flint, Grand Rapids, Kalamazoo, and Saginaw MSAs, and in the Alma and Midland Micropolitan Statistical Areas.

81. There are no likely procompetitive or efficiency-enhancing effects of the MFNs that would outweigh the actual and likely anticompetitive effects alleged above. The MFNs have not led, and likely will not lead, to lower hospital prices for Blue Cross or other insurers. On no

occasion has a Blue Cross MFN resulted in Blue Cross' paying less for hospital services.

82. If not enjoined, Blue Cross' MFNs with Michigan hospitals are also likely to have anticompetitive effects in the future. Blue Cross has entered into MFNs with hospitals that are essential components of a competitive provider network. The MFNs preserve a discount differential in favor of Blue Cross that is sufficient to prevent effective competition. Absent an injunction, Blue Cross will seek to enter into and enforce MFN clauses with other hospitals in Michigan, with the purpose and likely effect of preventing effective entry or expansion by its competitors.

## VII. VIOLATIONS ALLEGED

### Count One – Unlawful Agreement in Violation of Sherman Act § 1

83. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 82 above,

84. Blue Cross has market power in the sale of commercial health insurance in each relevant geographic market alleged herein.

85. Each of the provider agreements between Blue Cross and a Michigan hospital containing an MFN provision is a contract, combination and conspiracy within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1.

86. Each of the challenged agreements has had, or is likely to have, substantial and unreasonable anticompetitive effects in the relevant markets, including but not limited to:

- a. Unreasonably restricting price and cost competition among commercial health insurers by limiting or preventing commercial health insurers in competition with Blue Cross from obtaining competitive pricing from critical hospitals;
- b. Unreasonably restricting the ability of hospitals to offer to Blue Cross'

competitors or potential competitors reduced prices for hospital services that the hospitals and insurers consider to be in their mutual interest;

c. Unreasonably limiting entry or expansion by competitors or potential competitors to Blue Cross in Michigan commercial health insurance markets;

d. Raising the prices of hospital services to commercial health insurers in competition with Blue Cross, and to self-insured employers and their employees;

e. Raising the prices of commercial health insurance; and

f. Depriving consumers of hospital services and commercial health insurance of the benefits of free and open competition.

87. The procompetitive benefits, if any, for these provider agreements do not outweigh the actual and likely anticompetitive effects of the agreements.

88. Each of the agreements between Blue Cross and a hospital in Michigan containing an MFN clause unreasonably restrains trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

**Count Two – Violation of MCL 445.772**

89. Plaintiff State of Michigan repeats and realleges the allegations of paragraphs 1 through 88 above.

90. Blue Cross entered into agreements with hospitals in Michigan that unreasonably restrain trade and commerce in violation of Section 2 of the Michigan Antitrust Reform Act, MCL 445.772.

**VIII. RELIEF REQUESTED**

WHEREFORE, Plaintiffs request that this Honorable Court:

a. adjudge and decree that the provider agreements between Blue Cross and hospitals in Michigan containing MFNs violate Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Michigan Antitrust Reform Act, MCL 445.772;

b. permanently enjoin Blue Cross, its officers, directors, agents, employees, and successors, and all other persons acting or claiming to act on its behalf, directly or indirectly, from seeking, negotiating for, agreeing to, continuing, maintaining, renewing, using, or enforcing or attempting to enforce any MFNs in any agreement, or any other combination, conspiracy, agreement, understanding, plan, program or other arrangement having the same purpose or effect as an MFN, with any hospital in Michigan;

c. reform the agreements between Blue Cross and hospitals in Michigan to strike the MFN clauses as void and unenforceable; and

d. award plaintiffs their costs in this action, including attorneys' fees to plaintiff  
the State of Michigan, and such other and further relief as may be just and proper.

Dated: October 18, 2010

FOR PLAINTIFF UNITED STATES OF AMERICA:

Christine A. Varney  
Assistant Attorney General

Molly S. Boast  
Deputy Assistant Attorney General

Joshua H. Soven, Chief  
Litigation I Section

J. Robert Kramer II  
Director of Operations  
Antitrust Division  
U.S. Department of Justice  
Washington, D.C. 20530

Barbara L. McQuade  
United States Attorney  
Eastern District of Michigan

Barry J. Joyce  
Anne Marie Blaylock  
Barry Creech  
Ryan Danks  
Mitchell Glende  
Steven Kramer  
Richard Liebeskind  
Peter Mucchetti  
Trial Attorneys  
Litigation I Section

By  
/s/ Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W.  
Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
Illinois Bar #6277334  
ryan.danks@usdoj.gov

Peter Caplan  
Assistant United States Attorney  
United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, Michigan 48226  
(313) 226-9784  
P-30643  
peter.caplan@usdoj.gov

FOR PLAINTIFF STATE OF MICHIGAN:

Michael A. Cox  
Attorney General  
State of Michigan

/s/ with the consent of M. Elizabeth Lippitt  
M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6<sup>th</sup> Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
P-70373  
LippittE@michigan.gov

**EXHIBIT 2**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

UNITED STATE OF AMERICA and  
STATE OF MICHIGAN,

Plaintiffs,

Case No. 10-14155

HONORABLE DENISE PAGE HOOD

v.

BLUE CROSS BLUE SHIELD OF  
MICHIGAN,

Defendant.

---

**MEMORANDUM OPINION AND ORDER  
DENYING MOTION TO DISMISS  
and  
ORDER REGARDING VARIOUS MOTIONS**

**I. BACKGROUND/FACTS**

On October 18, 2010, Plaintiffs United States of America ("United States") and the State of Michigan ("Michigan") filed the instant action against Defendant Blue Cross Blue Shield of Michigan ("Blue Cross") alleging that Blue Cross' use of most favored nation ("MFN") clauses in its agreements with various hospitals violate: Section 1 of the Sherman Act, 15 U.S.C. § 1 (Count One) and Section 2 of the Michigan Antitrust Reform Act, M.C.L. § 445.772 (Count Two). The Complaint alleges that each of the provider agreements between Blue Cross and Michigan hospitals containing an MFN provision is a contract, combination and conspiracy within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Comp., ¶ 85) The Complaint further alleges that Blue Cross entered into agreements with hospitals in Michigan that unreasonably restrain trade and commerce in violation of Section 2 of the Michigan Antitrust Reform Act, M.C.L. § 445.772.

(Comp., ¶ 90)

Blue Cross is a Michigan nonprofit healthcare corporation headquartered in Southfield, Michigan. (Comp., ¶ 7) Blue Cross is subject to federal taxation but is exempt from state and local taxation under Michigan law. (*Id.*) Directly and through its subsidiaries, Blue Cross provides commercial and other health insurance products, including preferred provider organization (“PPO”) health insurance products and health maintenance organization (“HMO”) health insurance products. (*Id.*) Blue Cross is the largest provider of commercial health insurance in Michigan. (Comp., ¶ 1) Blue Cross competes with for-profit and nonprofit health insurers. (*Id.*) Blue Cross’ commercial health insurance policies cover more than three million Michigan residents, more than 60% of the commercially insured population. (*Id.*) Blue Cross insures more than nine times as many Michigan residents as its next largest commercial health insurance competitor. (*Id.*) Blue Cross had revenues in excess of \$10 billion in 2009. (*Id.*)

Blue Cross is also the largest non-governmental purchaser of health care services, including hospital services, in Michigan. (Comp., ¶ 2) As part of its provision of health insurance, Blue Cross purchases hospital services on behalf of its insureds from all 131 general acute care hospitals in Michigan. (*Id.*) Blue Cross purchased more than \$4 billion in hospital services in 2007. (*Id.*)

Blue Cross has sought to include MFNs (sometimes called “most favored pricing,” “most favored discount,” or “parity” clauses) in many of its contracts with hospitals over the past several years. (Comp., ¶ 3) Blue Cross currently has agreements containing MFNs or similar clauses with at least 70 of Michigan’s 131 general acute care hospitals. (*Id.*) These 70 hospitals operate more than 40% of Michigan’s acute care hospital beds. (*Id.*)

Blue Cross generally enters into two types of MFNs, which require a hospital to provide

hospital services to Blue Cross' competitors either at higher prices than Blue Cross pays or at prices no less than Blue Cross pays. (Comp., ¶ 4) Both types of MFNs inhibit competition. (*Id.*) The first type is known as "MFN-plus." (Comp., ¶ 4(A)) Blue Cross' existing MFNs include agreements with 22 hospitals that require the hospital to charge some or all other commercial insurers *more than* the hospital charges Blue Cross, typically by a specified percentage differential. (*Id.*) These hospitals include major hospitals and hospital systems, and all of the major hospitals in some communities. (*Id.*) These 22 hospitals operate approximately 45% of Michigan's tertiary care hospital beds (providing a full range of basic and sophisticated diagnostic and treatment services, including many specialized services.) (*Id.*) Blue Cross' MFN-plus clauses require that some hospitals charge Blue Cross' competitors as much as 40% more than they charge Blue Cross. (*Id.*)

Two hospital contracts

with MFN-plus clauses also prohibit giving Blue Cross' competitors better discounts than they currently receive during the life of the Blue Cross contracts. (*Id.*) Blue Cross' MFN-plus clauses guarantee that Blue Cross' competitors cannot obtain hospital services at prices comparable to the prices Blue Cross pays, which limits other health insurers' ability to compete with Blue Cross. (*Id.*) Blue Cross has sought and, on most occasions, obtained MFN-plus clauses when hospitals have sought significant rate increases. (*Id.*)

The second type of MFN clause is considered as "Equal-to MFNs." (Comp., ¶ 4(B)) Blue Cross entered into agreements containing MFNs with more than 40 small, community hospitals, which typically are the only hospitals in their communities, requiring the hospitals to charge other commercial health insurers at least as much as they charge Blue Cross. (*Id.*) Under these agreements, Blue Cross agreed to pay more to community hospitals, which Blue Cross refers to as "Peer Group

5<sup>th</sup> hospitals, raising Blue Cross' own costs and its customers' costs, in exchange for the equal-to MFN. (*Id.*) A community hospital that declines to enter into these agreements would be paid approximately 16% less by Blue Cross than if it accepts the MFN clause. (*Id.*) Blue Cross also entered into equal-to MFNs with some larger hospitals as well. (*Id.*)

Blue Cross sought and obtained MFNs in many hospital contracts in exchange for increases in the prices it pays for the hospitals' services. (Comp., ¶5) In these instances, Blue Cross has purchased protection from competition by causing hospitals to raise the minimum prices they can charge to Blue Cross' competitors but, in doing so, has also increased its own costs. (*Id.*) Blue Cross has not sought or used MFNs to lower its own cost of obtaining hospital services. (*Id.*)

The United States and Michigan argue Blue Cross' MFNs have caused many hospitals to (1) raise prices to Blue Cross' competitors by substantial amounts, or (2) demand prices that are too high to allow competitors to compete, effectively excluding them from the market. (Comp., ¶6) By denying Blue Cross' competitors access to competitive hospital contracts, the MFNs have deterred or prevented competitive entry and expansion in health insurance markets in Michigan. (*Id.*) This has resulted in increased prices for health insurance sold by Blue Cross and its competitors, in addition to higher prices for hospital services paid by insureds and self-insured employers. (*Id.*)

Michigan purchases group health insurance for approximately 52,000 employees and 180,000 retirees and dependents, including residents of each of the areas directly affected by Blue Cross' conduct. (Comp., ¶9) In particular, Michigan purchases health insurance for its employees from Blue Cross and others, and 60% of Michigan employees and nearly all Michigan retirees are covered by Blue Cross health plans. Michigan employees covered by Blue Cross are self-insured by Michigan, and increases in hospital costs are borne directly by Michigan and its employees. (*Id.*)

Michigan claims it has been injured, and is likely to be injured, in its business and property as a result of Blue Cross' violations. (*Id.*)

In lieu of an Answer, Blue Cross filed a Motion to Dismiss. The United States and Michigan have filed responses to the motion. Blue Cross replied. A hearing was held on the matter on April 19, 2011. At a hearing on related cases on June 7, 2011, the Court briefly indicated it would deny Blue Cross' Motion to Dismiss and would issue a written order with its analysis.

On June 30, 2011, Blue Cross filed a Motion for Leave to File Supplemental Authority. The United States and Michigan oppose the motion in their Response filed on July 6, 2011. Blue Cross filed a reply to the response on July 7, 2011 arguing that the Court had yet to prepare a written order pursuant to Rule 58<sup>1</sup> of the Rules of Civil Procedure and without such a written order, Blue Cross is unable to formulate whether it is able to file a motion for reconsideration. Despite Blue Cross' representation that it is unable to formulate arguments in response to the Court's denial of its Motion to Dismiss and without the Court's ruling on Blue Cross' Motion for Leave to File Supplemental Authority, Blue Cross filed a Notice of Interlocutory Appeal on August 5, 2011. It is noted Blue Cross filed the Notice of Interlocutory Appeal without first seeking permission from this Court and without allowing Plaintiffs to argue whether an interlocutory appeal is appropriate. *See*, 28 U.S.C. § 1292 and Rule 5 of the Federal Rules of Appellate Procedure; *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

---

<sup>1</sup> Fed. R. Civ. P. 58 applies to judgments where either the court or a jury decides a case. *See*, Rule 58 Comments, 1937 Adoption, 1963 Amendment. No such decision has been rendered in this case.

## II. ANALYSIS

### A. Motion to Dismiss Standard of Review

Rule 12(b)(6) of the Rules of Civil Procedure provides for a motion to dismiss based on failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court explained that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.] Factual allegations must be enough to raise a right to relief above the speculative level...” *Id.* at 555 (internal citations omitted). Although not outright overruling the “notice pleading” requirement under Rule 8(a)(2) entirely, *Twombly* concluded that the “no set of facts” standard “is best forgotten as an incomplete negative gloss on an accepted pleading standard.” *Id.* at 563. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.* at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* at 557. Such allegations are not to be discounted because they are “unrealistic or nonsensical,” but rather because they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1951, 173 L.Ed.2d 868 (2009). In sum, for a complaint to survive a motion to dismiss, the non-conclusory “factual content” and the

reasonable inferences from that content, must be “plausibly suggestive” of a claim entitling a plaintiff to relief. *Id.* Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not “show[n]”-“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2). The court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001).

## **B. Section 1 of the Sherman Act**

### **1. Elements**

In order to establish a violation of Section 1 of the Sherman Act, three elements must be met: 1) an agreement 2) affecting interstate commerce 3) that unreasonably restrains trade. *White and White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983). Reviewing the Complaint, the United States and Michigan assert that Blue Cross entered into agreements with various hospitals which affect interstate commerce, satisfying elements one and two. (Comp., ¶ 85) Blue Cross does not move to dismiss based on these two elements but moves to dismiss under the third element—whether the MFN clauses at issue unreasonably restrain trade. The parties agree that in order to assess whether the MFN clauses unreasonably restrain trade, the “rule of reason” is applied. An agreement violates the rule of reason if it “may suppress or even destroy competition,” rather than promote competition. *American Needle, Inc. v. National Football League*, 130 S.Ct. 2201, 2217 n. 10 (2010)(quoting, *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918)). “To state a claim under the rule-of-reason test, a plaintiff must allege, *inter alia*, that the purportedly unlawful contract, combination or conspiracy produced adverse anticompetitive effects

within relevant product and geographic markets.” *Warrior Sports, Inc. v. National Collegiate Ath. Ass’n*, 623 F.3d 281, 286 (6th Cir. 2010). In order to survive a motion to dismiss under the rule of reason test, the complaint must plausibly allege that the MFNs produced adverse anticompetitive effects within relevant product and geographic markets.

Blue Cross argues that the Complaint fails to plausibly allege relevant product markets, geographic markets, market power, anticompetitive effects arising from the use of MFNs in any relevant market and facts supporting a viable legal theory of harm such as recoupment or foreclosure. The United States and Michigan argue that the Complaint sufficiently alleges plausible markets, anticompetitive effects and a legal theory of harm.

## 2. Product Markets

Relevant product or geographic markets are sufficiently alleged as long as the complaint bears a “rational relation to the methodology courts prescribe to define a market.” *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001). Courts hesitate to grant motions to dismiss for failure to plead a relevant product market because market definition is a fact-intensive inquiry only after a factual inquiry into the commercial realities faced by the consumers. *Id.* at 199-200; *Eastman Kodak Co., v. Image Tech., Servs., Inc.*, 504 U.S. 451, 467 (1992). A product market consists of products that have “reasonable interchangeability.” *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 933 (6th Cir. 2005).

Blue Cross argues that the Complaint fails to allege a market-by-market explanation of the insurance companies involved and their products and services. The United States and Michigan assert that there is no requirement at the pleading stage to allege such a market-by-market explanation. They argue that the Complaint sufficiently alleges two product markets, not two to six

2:10-cv-14155-DPH-MKM Doc # 66 Filed 08/12/11 Pg 9 of 23 Pg ID 1868

as asserted by Blue Cross. The two product markets affected by the MFN clauses alleged in the Complaint are: commercial group health insurance and commercial individual health insurance. (Comp., ¶¶ 20, 22, 24) Although the reason why these product markets are not interchangeable need not be alleged at the pleading stage as argued by the United States and Michigan, they claim that the Complaint sets forth the reason why these product markets are not interchangeable. The Complaint alleges that commercial group health insurance sold in Michigan includes access to a provider network which is considered to be an important element of a health insurance product because the network specifies the physicians and hospitals to which patients can turn for service with substantially lower costs to themselves. (Comp., ¶ 20) As to commercial individual health insurance, the Complaint alleges that this product is significantly more expensive than group health insurance and lacks group insurance's tax benefits. (Comp., ¶ 21) There is no other product which is reasonably interchangeable because this is the only product available to individuals without access to group coverage or government programs that allows them to reduce the financial risk of adverse health conditions and to have access to health care providers at discounted prices negotiated by commercial health insurers. (Comp., ¶¶ 21-22)

A review of the Complaint finds that it plausibly alleges the product markets at issue—the commercial group health insurance and the commercial individual insurance product markets. The Court finds no requirement at the pleading stage that a market-by-market analysis is required to be alleged in the Complaint. The United States and Michigan have plausibly stated the product markets in their Complaint.

### **3. Geographic Markets**

Blue Cross asserts that the Complaint fails to allege plausible facts to establish geographic

markets. Blue Cross argues that use of statistical data is not appropriate in establishing the appropriate geographic markets. Blue Cross further argues that health insurance markets are “national” rather than local and that the Complaint fails to focus on whether capital for spreading financial risk can be supplied on a national basis. The United States and Michigan respond that the Complaint sufficiently alleges the geographic markets at issue and that the Complaint need not detail specific facts to support the geographic markets at issue.

Geographic markets need not be alleged or proven with “scientific precision,” nor be defined “by metes and bounds as a surveyor would lay off a plot of ground.” *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966); *White and White*, 723 F.2d at 503. The complaint need only present sufficient information to plausibly suggest the contours of the relevant geographic market. *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010).

There are 17 specific geographic markets alleged in the Complaint. The Complaint further alleges that geographic markets for health insurance are local because the purchasers of health insurance demand access to networks of hospitals and physicians close to their homes and workplaces. (Comp., ¶ 25) The effect of Blue Cross’s MFNs as to geographic markets “is the area in which the hospital subject to the MFN operates and in which employers and insureds can practicably turn for hospitals included in the provider network offered for sale as part of a commercial health insurance product.” (Comp., ¶ 26) An example of a geographic area used in the Complaint is the Lansing area: “Lansing area employers and insureds cannot practicably turn to commercial health insurers that do not offer network access to [physicians and] hospitals in Lansing” Metropolitan Statistical Area (“MSA”). (Comp., ¶ 27) Geographic markets are analyzed

by using a “localized approach” and a metropolitan area may be an appropriate geographic market. *Conn. Nat’l Bank*, 418 U.S. at 670; *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 619 (1974).

The Court’s review of the Complaint shows that it plausibly alleges sufficient facts to establish geographical markets. At the pleading stage, the Complaint states a claim that consumers demand access to local providers and, therefore, the health insurance markets are local. Access to provider networks within the consumers’ geographical area is plausible. The use of statistical metropolitan data, such as the MSA, is plausible to establish the geographical area alleged in the Complaint.

#### 4. Market Power

Blue Cross argues that the Complaint fails to allege market shares because the Complaint does not allege market shares by geographic market separately for group and individual health insurance. The United States and Michigan argue that the Complaint sufficiently alleges market power.

To sufficiently plead market power, a complaint must “provide a sufficient factual predicate to support its allegations that the defendants enjoy market power in the relevant market.” *Foundation for Interior Design v. Savannah College*, 244 F.3d 521, 531 (6th Cir. 2001). Market power can be inferred from high market shares. *Spirit*, 431 F.3d at 935.

The Complaint in this case alleges that Blue Cross’ market share in the geographic market ranges from 40% to more than 80%. (Comp., ¶ 28) Blue Cross admits that it is the dominant health insurer in Michigan. (B.C. Br., at 16) Estimations of market share is sufficient to infer market power. *See, Toys ‘R’ Us, Inc. v. F.T.C.*, 221 F.3d 928, 937 (7th Cir. 2000)(Shares between 20% to

49% is sufficient to sustain an antitrust claim.). The Complaint alleges that the MFNs have excluded competitors and caused price increases. (Comp., ¶¶ 41-79)

The Court finds that the allegations as to market share in the Complaint are plausible at this pleading stage.

### **5. Anticompetitive Effects**

Blue Cross asserts that the MFNs are procompetitive, therefore, the Complaint fails to state the MFNs' anticompetitive effects. The United States and Michigan respond that the Complaint alleges detailed allegations as to how Blue Cross' MFN clauses have negatively affected competition in the health insurance markets throughout Michigan. Although MFNs may be procompetitive, the United States and Michigan argue that a factual inquiry and, ultimately, a balancing of anticompetitive and procompetitive effects must be made but not at the pleading stage.

The Complaint alleges that the MFN clauses have negatively impacted competition in the health insurance markets throughout Michigan, by raising competitors' costs, likely increasing premiums, and directly increasing costs to self-insured employers. (Comp., ¶¶ 41-48) The Complaint sets forth various examples, such as the Upper Peninsula, Alpena County and the Lansing area. In the Upper Peninsula, the Complaint alleges that the MFN-plus entered into by Blue Cross with Marquette General, affects competition because the hospital is the only tertiary care hospital in the Upper Peninsula. The United States and Michigan claim the requirement that the hospital charge competing insurers at least 23% more than it charges Blue Cross affects potential competitors, such as Priority Health. (Comp., ¶ 49) Blue Cross has asserted that its contract will "keep blue lock on U.P." (Comp., ¶ 57) In Alpena County, Blue Cross offered Alpena Regional Medical Center, the only hospital in the area, a substantial rate increase in exchange for an MFN-

plus and a commitment that during the term of the contract, the hospital would not improve the discount it gave to any other health insurer. (Comp., ¶ 68) The United States and Michigan claim this has resulted in loss of competition in that Priority Health's prices have increased. (Comp., ¶ 69) Blue Cross entered into a ten-year contract with Sparrow Hospital in Lansing that requires Sparrow to charge most other insurers at least 12% more than Blue Cross pays. The Complaint alleges that this will likely result in a price increase to other insurers in Lansing and could cause other hospitals in the area to increase prices charged to Sparrow's own health plan. (Comp., ¶¶ 60, 63-64)

Based on the allegations in the Complaint, it is plausible that the MFNs entered into by Blue Cross with various hospitals in Michigan establish anticompetitive effects as to other health insurers and the cost of health services in those areas.

## 6. Harm

Blue Cross argues that the Complaint fails to allege plausible harm such as foreclosure and recoupment. In response, the United States and Michigan argue that the Complaint specifically alleges foreclosure and that recoupment is not at issue in this case.

A competitor is "foreclosed" from competing when it is denied or disadvantaged in its access to significant sources of input or distribution. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189-90 (3d Cir. 2005) The Complaint alleges that Blue Cross has entered into MFNs with major hospitals and health systems and community hospitals which have resulted in competitors being excluded from these markets. (Comp., ¶¶ 4, 14, 69, 77-79, 56) As noted above, it is claimed that Priority has been unable to enter the market in the Upper Peninsula because of the MFN clause between Blue Cross and Marquette General. Although the term "foreclose" is not set forth in the Complaint, it plausibly alleges facts that other insurers have been excluded or may be excluded or

“foreclosed” from entering the markets because of the MFN clauses between Blue Cross and these hospitals.

As to “recoupment,” the case cited by Blue Cross involved a “predatory bidding” claim which is not the claim in this case. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007). The claim in this case involves the MFNs used by Blue Cross which prevent other insurers from entering the market.

**C. Michigan Antitrust Reform Act**

Blue Cross argues that its conduct is exempt from the Michigan Antitrust Reform Act (“MARA”), M.C.L. § 445.774. Michigan responds that Blue Cross is not exempt. MARA applies to entities engaged in trade or commerce in Michigan. There are exemptions:

This act shall not apply to a transaction or conduct of an authorized health maintenance corporation, health insurer, medical care corporation, or health service corporation or health care corporation when the transaction or conduct is to reduce the cost of health care and is permitted by the commissioner. This subsection shall not affect the enforcement of the federal antitrust act by federal courts or federal agencies.

M.C.L. § 445.774(6).

The exemption only applies to health insurers “when the transaction or conduct is to reduce the cost of health care and is permitted by the commissioner.” *Id.* The Complaint alleges that the MFNs “have not led, and likely will not lead, to lower hospital prices for Blue Cross or other insurers. On no occasion has a Blue Cross MFN resulted in Blue Cross’ paying less for hospital services.” (Comp., ¶ 81) The Complaint has plausibly alleged that the MFNs at issue did not reduce the cost of health care. At this stage of the proceedings, Blue Cross has not shown it is exempt under M.C.L. § 445.774(6).

Blue Cross also argues that it is exempt under the following:

\* \* \*

(4) This act shall not apply to a transaction or conduct specifically authorized under the laws of this state or the United States, or specifically authorized under laws, rules, regulations, or orders administered, promulgated, or issued by a regulatory agency, board, or officer acting under statutory authority of this state or the United States.

(5) A transaction or conduct made unlawful by this act shall not be construed to violate this act where it is the subject of a legislatively mandated pervasive regulatory scheme, including but not limited to, the insurance code of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, which confers exclusive jurisdiction on a regulatory board or officer to authorize, prohibit or regulate the transaction or conduct.

M.C.L. § 450.774(4)-(5).

Michigan argues that Blue Cross is not mentioned in this section whereas Blue Cross is mentioned in subsection (6) above. The Court agrees with Michigan's argument given that Blue Cross is specifically mentioned in subsection (6). Subsections (4) and (5) do not apply to Blue Cross. Even if these two subsections applied, the transaction at issue—the use of MFNs to prevent competition—has not been authorized by either federal or state law. Additionally, the Michigan Attorney General is authorized to bring actions against Blue Cross. M.C.L. § 550.1619(2), 550.1515(1).

The Court finds that the Complaint plausibly alleges a violation under the MARA and denies Blue Cross' Motion to Dismiss this claim.

**D. Defenses/Abstention**

Blue Cross bases its motion on various defenses, such as state action immunity because Michigan heavily regulates the insurance industry. Another reason set forth by Blue Cross is that

any decision in this case would disrupt substantial state law bearing on Blue Cross' special status as a quasi-public entity agency and designation as the insurer of last resort. Blue Cross urges the Court to abstain from hearing the case because there is adequate state remedy, such as review by the Insurance Commissioner of these MFN clauses.

The United States and Michigan argue that state action immunity is not applicable and that the Court should not abstain from hearing this case. They respond that Blue Cross mischaracterizes the Complaint because the Complaint is not seeking to prevent Blue Cross from obtaining the lowest prices from hospitals. The United States and Michigan allege that the Complaint attacks Blue Cross' use of MFNs to prevent its competitors from obtaining the best prices that the competitors can obtain, without interference from Blue Cross. The United States argues that it has no remedy before the State, therefore the Court should not abstain from hearing the case.

#### **1. State Action Immunity**

The Supreme Court established a two-part test for determining whether state action immunity saves certain actions from preemption by the Sherman Act: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *First Amer. Title Co. v. Devaugh*, 480 F.3d 438, 445 (6th Cir. 2007); *Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The state action immunity doctrine, like other judicially-imposed exemptions from the antitrust laws, must be narrowly construed. *First Amer. Title*, 480 F.3d at 445.

As to the first prong—the challenged restraint must be one clearly articulated and affirmatively expressed as state policy—the Court finds that Blue Cross has failed to meet this prong.

The challenged restraint in the Complaint is Blue Cross' use of the MFNs to unreasonably restrain competition with other insurers. The purpose and policy of the Nonprofit Health Care Corporation Reform Act ("NHCCRA") is-

to promote an appropriate distribution of health care services for all residents of this state, to promote the progress of the science and art of health care in this state, and to assure for nongroup and group subscribers, reasonable access to, and a reasonable cost and quality of, health care services, in recognition that the health care financing system is an essential part of the general health, safety, and welfare of the people of this state.

\* \* \*

It is the intention of the legislature that this act shall be construed to provide for the regulation and supervision of nonprofit health care corporations by the commissioner of insurance so as to secure for all of the people of this state who apply for a certificate, the opportunity for access to health care services at a fair and reasonable price.

M.C.L. § 550.1102(1) and (2). With respect to providers, Blue Cross shall contract with such providers "to assure subscribers reasonable access to, and reasonable cost and quality of, health care services, ..." M.C.L. § 550.1504(1). The following goals of the contract are:

- (a) There will be an appropriate number of providers throughout this state to assure the availability of certificate-covered health care services to each subscriber.
- (b) Providers will meet and abide by reasonable standards of health care quality.
- (c) Providers will be subject to reimbursement arrangements that will assure a rate of change in the total corporation payment per member to each provider class that is not higher than the compound rate of inflation and real economic growth.

M.C.L. § 500.1504. Provider class plans retained by the commissioner or approved by a hearing officer shall maintain certain standards and, as to hospitals, also include:

(a) To the extent practicable, reimbursement control shall be expressed in the aggregate to individual hospitals.

(b) No portion of the health care corporation's fair share of the hospitals' reasonable financial requirements shall be borne by other health care purchasers. However, this portion shall not preclude reimbursement arrangements which include financial incentives and disincentives.

(c) The health care corporation's programs and policies shall not unreasonably interfere with the hospital's ability and responsibility to manage its operations.

M.C.L. § 500.1516. Blue Cross may enter into provider contracts executed under the Prudent Purchaser Act, M.C.L. §§ 550.1502a and 550.51-63.

Blue Cross argues that, based on the extensive regulatory scheme governing Blue Cross' existence and because Blue Cross is considered a quasi-public creation of statute, Blue Cross is immune under the state action doctrine. Narrowly construing the state action immunity doctrine, the Court's review of the statutes governing Blue Cross' actions reveals that the legislature did not clearly articulate nor affirmatively express the act sought to be restrained—using MFNs to deter competition with other insurers. The NHCCRA's express stated purpose and policy are set forth above—"to secure for all of the people of this state who apply for a certificate, the opportunity for access to health care services at a fair and reasonable price." M.C.L. § 550.1102(1) and (2). The main goal of the NHCCRA is to assure access by the people to health care services; not for Blue Cross to enter into contracts with providers which discourages competition with other insurers—for profit or otherwise. The NHCCRA states that no portion of Blue Cross' fair share of the hospitals' reasonable financial requirements shall be borne by other health care purchasers. M.C.L. § 550.1516(2)(b). Although the Act allows Blue Cross to include reimbursement arrangements which include financial incentives and disincentives, such arrangements cannot result in cost shifting to

other health care purchasers. The purpose of the NHCCRA is to make certain that the people of Michigan are able to access health care services at a fair and reasonable price. There is no provision in the NHCCRA that allows Blue Cross to stifle competition. The Complaint alleges sufficiently, as previously noted, that the MFNs at issue prevent other insurers from competing with Blue Cross.

The second prong for determining whether state action immunity applies is whether the State actively supervises the policy. Based on the many provisions of the NHCCRA and other regulations relating to the statute, the State actively supervises the policy of ensuring that the people of the State are able to access health care services at a fair and reasonable price. However, Blue Cross is unable to point to any provision of the NHCCRA which allows MFNs with hospital providers which prevent other insurers from competing with Blue Cross—which is the challenged restraint alleged in the Complaint.

Blue Cross' argument that the Insurance Commissioner has the authority to investigate and modify Blue Cross' provider contracts is not found in the statute. There is no provision that mandates the Insurance Commissioner's review of specific contracts and review of MFN clauses before Blue Cross enters into such contracts with hospitals. The Act only allows the Insurance Commissioner to review provider *plans* and to examine the plan and determine "only if the plan contains a reimbursement arrangement and objectives for each goal provided in section 504 .." M.C.L. § 550.1506(2).

Narrowly construing the state action immunity doctrine, for the reasons above, the Court finds that such immunity does not apply to Blue Cross' use of MFNs in the contracts with hospitals as set forth in the Complaint.

## 2. Quasi-Public Entity

Blue Cross argues that it is a “quasi-public entity.” Courts have held that Blue Cross is not a public entity but a private entity and that Blue Cross, itself, has continued to so argue in other cases. *Riverview Investments, Inc. v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 480-82 (6th Cir. 1992). Blue Cross manages its own business, controls its contracting relationship with providers and controls its substantive surpluses. M.C.L. §§ 550.1301(2), 550.1301(1), 550.1206(1). This Court in another case has accepted Blue Cross’ argument that it is a private entity, not a state actor. *Loftus v. Blue Cross Blue Shield of Michigan*, 2010 WL 1139338, \*4 (E.D. Mich. Mar. 24, 2010)(Hood).

### 3. Abstention

Blue Cross’ abstention argument under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) is not applicable because there is no available review of the MFN clauses by the Commissioner under the NHCCRA. Blue Cross has not shown that the Commissioner, in fact, reviewed the MFN clauses at issue. The United States’ only forum for enforcing federal antitrust laws is in the federal district court, which has exclusive jurisdiction under Sherman Act claims. 15 U.S.C. § 4. This section precludes *Burford* abstention. *Andrea Theaters, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 63 (2d Cir. 1986)(Abstention in a federal antitrust case would run counter to Congress’ intent in granting exclusive federal jurisdiction over these claims). The Court declines to abstain from hearing this case.

#### E. Blue Cross’ Motion to Strike Letter from Michigan Attorney General

Blue Cross seeks to strike a letter from the Attorney General (Doc. #32) explaining why Michigan supports the arguments raised by the United States as to abstention and state action immunity because Blue Cross claims the letter is not a properly filed surreply.

It is true that the letter, filed after Blue Cross submitted its reply to the responses is considered a surreply and is not authorized under the Rules. However, because Blue Cross extensively argues its position in the Motion to Strike, its original Motion to Dismiss and reply, Blue Cross is not prejudiced by the surreply. The surreply does not raise any new arguments not raised by the United States or Michigan. As noted below, Blue Cross has also filed a supplemental document to support its Motion to Dismiss which is not authorized by the Rules as well. The Court has the discretion to allow documents to be filed and, since there is no prejudice to Blue Cross, the Court will not strike the letter.

**F. Blue Cross' Motion for Leave to File Supplemental Authority**

The Court grants Blue Cross' Motion for Leave to File Supplemental Authority since, at the time Blue Cross filed the motion on June 30, 2011, the Court had yet to enter its Order on the motion. The United States and Michigan are not prejudiced given that they had the opportunity to respond to the motion. However, the Court finds that the case attached, *FTC and Georgia v. Phoebe Putney Health System*, Case No. 1:11-cv-58 (M.D. Ga. Order dated June 27, 2011)(unpublished), is not applicable because the transaction at issue in that case—a certain acquisition—was found to be regulated by the Georgia Legislature. In this case, as set forth above, the transaction at issue—the use of MFNs—is not regulated by the Michigan statutes governing Blue Cross' conduct.

**G. Blue Cross' Motion to Stay Discovery Pending Ruling**

Blue Cross seeks a stay in discovery pending a ruling on the Motion to Dismiss. The parties' Rule 26(f) report indicates they have not exchanged disclosures based on Blue Cross' request to stay discovery pending this ruling. The Court has now ruled on the Motion to Dismiss rendering this motion moot.

#### **H. The United States and Michigan's Motion to Compel Discovery**

The United States and Michigan seek production of documents in response to their First Request for the Production of Documents served on February 4, 2011 under Rule 34. Blue Cross objected to the discovery for two reasons: the pending Motion to Dismiss, and relevancy as to the documents from 2004 to 2005 relating to Blue Cross' development of the MFN provisions, claiming that these documents antedate the dates in the Complaint.

The Court finds the documents from 2004 to 2005 are relevant since the documents may establish Blue Cross' intent as to the MFNs. The documents must be produced within 30 days from the entry of this Order.

#### **III. CONCLUSION**

For the reasons set forth above,

IT IS ORDERED that Blue Cross Blue Shield of Michigan's Motion to Dismiss (**Doc. No. 12, filed December 17, 2010**) is DENIED.

IT IS FURTHER ORDERED that Blue Cross Blue Shield of Michigan's Motion to Stay Discovery Pending a Ruling on Defendant's Motion to Dismiss (**Doc. No. 20, filed January 24, 2011**) is MOOT.

IT IS FURTHER ORDERED that Blue Cross Blue Shield of Michigan's Motion to Strike Letter from the Michigan Attorney General (**Doc. No. 34, filed March 7, 2011**) is DENIED.

IT IS FURTHER ORDERED that Blue Cross Blue Shield of Michigan's Motion to Compel Production of Documents (**Doc. No. 38, filed March 18, 2011 (redacted) and Doc. No. 39, filed March 18, 2011 (sealed and unredacted)**) is GRANTED.

IT IS FURTHER ORDERED that Blue Cross Blue Shield of Michigan's Motion for Leave

2:10-cv-14155-DPH-MKM Doc # 66 Filed 08/12/11 Pg 23 of 23 Pg ID 1882

to File Supplemental Authority (**Doc. No. 55, filed June 30, 2011**) is GRANTED.

s/Denise Page Hood

Denise Page Hood

United States District Judge

Dated: August 12, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 12, 2011, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry

Case Manager

**EXHIBIT 3**

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

Northern District of Indiana

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: St. Catherine Hospital, Inc. (c/o custodian of records)
4321 First Street, East Chicago, IN 46312

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:

Place: Dickinson Wright PLLC (attn: Nicole M Wotlinski)
500 Woodward Avenue Suite 4000
Detroit, Michigan 48226-3425
Date and Time: 10/31/2011 9:00 am

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: 10/07/2011

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

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-1415-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)* St. Catherine Hospital, Inc., Custodian of Records  
was received by me on *(date)* 10/10/2011

I served the subpoena by delivering a copy to the named person as follows: Brooke Sechrest,  
Medical Records Custodian, authorized to accept at 4321 First Street, East Chicago,  
Indiana 46312 at 1:36 p.m. on *(date)* 10/10/2011 ; 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  
\$ n/a

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: 10/10/2011

Bary A Savage  
*Server's signature*

Bary A Savage, Private Process  
*Printed name and title* Server

Capitol Process Services, Inc.  
1827 18th Street, NW  
Washington, DC 20009  
(202) 667-0050

*Server's address*

Additional information regarding attempted service, etc:

\* with Letter dated October 7, 2011, Defendant Blue Cross Blue Shield of Michigan's  
Notice of Subpoena, Attachment A, Stipulated Protective Order Concerning Confidentiality  
and [Proposed] Agreement Concerning Confidentiality



HUNTON & WILLIAMS LLP  
2200 PENNSYLVANIA AVE., N.W.  
WASHINGTON, D.C. 20037

TEL 202 • 955 • 1500  
FAX 202 • 778 • 2201

TODD M. STENERSON  
DIRECT DIAL: 202-419-2184  
EMAIL: tstenerson@hunton.com

October 7, 2011

VIA PROCESS SERVER

Custodian of Records  
St. Catherine Hospital, Inc.  
4321 First Street  
East Chicago, IN 46312

Re: *United States v. Blue Cross Blue Shield of Michigan,*  
No. 10-cv-14155-DPH-MKM (E.D.Mich.)

Dear Sir or Madam:

Blue Cross Blue Shield of Michigan's non-party subpoena, issued pursuant to Fed. R. Civ. P. 45 in the above-referenced matter, is enclosed. This subpoena requires St. Catherine Hospital, Inc. to produce certain documents, which are identified in Attachment A to the subpoena. The production of documents in this case is governed by the terms of the enclosed Confidentiality Order.

After you have reviewed the enclosed subpoena, if you have any questions regarding the scope or the type of documents requested, please feel free to contact me or Kristina Van Horn at the number above. Further, if you have a conflict with the date or manner of the production, please communicate with me to discuss a mutually agreeable date and time to proceed. Also, we would be happy to furnish you with a pre-paid means of providing copies of relevant documents to us.

Finally, please note that we are continuing to formulate our request for certain data and financial information and reserve the right to supplement this subpoena for that information at a later date.

Sincerely,



Todd M. Stenerson

Enclosures

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**

Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
Farayha J. Arrine (P73535)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

Todd M. Stenerson (P51953)  
Marty Steinberg (DC Bar 996403)  
Bruce Hoffman (Adm. MI, DC Bar 495385)  
David Higbee (DC Bar 500605)  
Neil K. Gilman (Adm. MI, DC Bar 449226)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
202-955-1500  
tstenerson@hunton.com

Robert A. Phillips (P58496)  
BLUE CROSS BLUE SHIELD OF MICHIGAN  
600 Lafayette East, MC 1925  
Detroit, MI 48226  
313-225-0536  
rphillips@bcbsm.com

**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 St. Catherine Hospital, Inc. on 10/7/2011 or as soon thereafter as service may be effectuated.

Dated: 10/7/2011

Respectfully submitted,

/s/ Todd M. Stenerson

Todd M. Stenerson (P51953)

Hunton & Williams LLP

2200 Pennsylvania Ave., NW

Washington, DC 20037

Phone: 202-955-1500

Fax: 202-778-7436

tstenerson@hunton.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of October 2011, I caused the foregoing Notice of Subpoena to be served by email on the following:

Amy Fitzpatrick  
[amy.fitzpatrick@usdoj.gov](mailto:amy.fitzpatrick@usdoj.gov)  
Barry Joyce  
[barry.joyce@usdoj.gov](mailto:barry.joyce@usdoj.gov)  
Steven Kramer  
[steven.kramer@usdoj.gov](mailto:steven.kramer@usdoj.gov)  
U.S. Department of Justice  
450 Fifth Street, N.W.  
Suite 4100  
Washington, DC 20530  
Attorneys for the United States

M. Elizabeth Lippitt  
[lippitte@michigan.gov](mailto:lippitte@michigan.gov)  
Assistant Attorney General  
Corporate Oversight Division  
P.O. Box 30755  
Lansing, MI 48909  
Attorney for the State of Michigan

And, the following attorneys in the related private civic matters:

Mary Jane Fait: ([fait@whafh.com](mailto:fait@whafh.com))  
John Tangren: ([tangren@whafh.com](mailto:tangren@whafh.com))  
Daniel Small: ([DSmall@cohenmilstein.com](mailto:DSmall@cohenmilstein.com))  
Besrat Gebrewold: ([BGebrewold@cohenmilstein.com](mailto:BGebrewold@cohenmilstein.com))  
Dan Hedlund: ([DHedlund@gustafsongluek.com](mailto:DHedlund@gustafsongluek.com))  
Casey Fry: ([caf@millerlawpc.com](mailto:caf@millerlawpc.com))  
Jason J. Thompson: ([JThompson@sommerspc.com](mailto:JThompson@sommerspc.com))  
Lance C. Young: ([LYoung@sommerspc.com](mailto:LYoung@sommerspc.com))

/s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Hunton & Williams LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
Phone: 202-955-1500  
Fax: 202-778-7436  
[tstenerson@hunton.com](mailto:tstenerson@hunton.com)

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

Northern District of Indiana

UNITED STATES OF AMERICA, et al.	)	
<i>Plaintiff</i>	)	
v.	)	Civil Action No. 2:10-cv-14155-DPH-MKM
BLUE CROSS BLUE SHIELD OF MICHIGAN	)	
<i>Defendant</i>	)	(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: St. Catherine Hospital, Inc. (c/o custodian of records)  
4321 First Street, East Chicago, IN 46312

**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:

Place: Dickinson Wright PLLC (attn: Nicole M Wollinski) 500 Woodward Avenue Suite 4000 Detroit, Michigan 48226-3425	Date and Time:  10/31/2011 9:00 am
---	--

**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: 10/07/2011

CLERK OF COURT

OR

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

  
*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

AD 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)(ii), 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).

## **ATTACHMENT A**

### **DEFINITIONS**

- A. "You," "Your" or "Your Hospital" refers to St. Catherine Hospital, Inc., its parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all its directors, officers, employees, agents, and representatives.
- B. "BCBSM" refers to Blue Cross Blue Shield of Michigan.
- C. "Healthcare payor" refers to any entity, other than BCBSM, that finances or reimburses the cost of personal health services, including but not limited to managed care companies, insurance carriers, providers of administrative services only, and governmental payors, such as Medicare.
- D. "MFN" refers to any most favored nation, most favored discount, or most favored pricing provision in any agreement you have with BCBSM or any other healthcare payor.
- E. "DRG" codes refers to diagnosis related groups codes used to describe hospital services.
- F. "CPT" codes refers to the current procedural terminology codes used to describe medical, surgical, and diagnostic services.
- G. "Document" is synonymous in meaning and scope to that term in Federal Rule of Civil Procedure 45(a)(1)(A)(iii), and includes electronically stored information, such as written, recorded or graphic matter, or computer or electronic records of written, recorded or graphic matter, of every type or description in your possession, custody, or control, whether an original or draft, wherever located. The term includes each copy that is not identical to any other copy.

### **INSTRUCTIONS**

- A. These Document Requests incorporate the instructions set forth in Federal Rule of Civil Procedure 45.
- B. Unless otherwise indicated, this subpoena seeks documents covering the period January 1, 2003 to the date of this subpoena.

### **SCHEDULE OF REQUESTED DOCUMENTS**

- 1. All documents describing your managed care contracting strategy.
- 2. All documents, including but not limited to communications, concerning or reflecting your negotiations with any healthcare payor for reimbursement of your services, including correspondence, letters of understanding, term sheets, draft and final contracts, internal notes, and meeting minutes, regardless of whether you reached a final agreement.

3. All documents concerning or reflecting any negotiations you had with any healthcare payor concerning any MFN provision, whether the MFN provision was agreed upon or not.
4. All documents concerning or reflecting any negotiations you had with any healthcare payor concerning any market-based pricing or market-based pricing provisions, whether the provision was agreed upon or not.
5. All documents describing your need or desire for rate increases from any healthcare payor.
6. All documents comparing your pricing or reimbursement rates charged to healthcare payors, whether between or among each other and/or BCBSM.
7. Documents reflecting your chargemaster.
8. All documents concerning or reflecting your utilization rate of any healthcare payor and/or BCBSM.
9. All documents reflecting how reimbursement rates relate in any way to the cost of any health insurance product sold by BCBSM or a commercial insurer.
10. Documents showing all hospitals, including in particular Michigan hospitals, against which you compete on any level, including but not limited to documents showing your competing services.
11. Documents concerning or reflecting the substitutability of your hospital with those other hospitals, including in particular Michigan hospitals, against which you compete.
12. Documents sufficient to show: (a) your hospital's primary service area and secondary service area; (b) the methodology used to define those service areas; and (c) your competitors in the provision of hospital services in those areas.
13. Documents showing the healthcare payors with which you contract.
14. Documents showing the discounts or pricing that you have negotiated with the healthcare payors with which you contract.
15. Documents concerning or reflecting the substitutability of healthcare payors, whether between or among each other and/or BCBSM.
16. All documents concerning or reflecting your plans or strategy for competing with other hospitals, including but not limited to hospitals that have captive healthcare payors.
17. Documents showing the geographic areas from which you receive patients, including but not limited to your patients' zip codes.
18. All documents showing uncompensated care statistics.

19. All documents reflecting any communications between you and anyone from the U.S. Department of Justice regarding this litigation in any way or regarding MFNs, whether as used by BCBSM or any other entity.
20. All documents concerning or reflecting any effort to enforce any MFN provision or other provision to provide the best price, whether with BCBSM or any healthcare payor.
21. All documents related to any price increase to any healthcare payor.
22. All documents related to any requested price increase to any healthcare payor.
23. All documents showing how you address Medicare and Medicaid shortfalls and how the costs of these shortfalls are spread among other healthcare payors.
24. All documents reflecting how reimbursement rates relate in any way to the cost of any health insurance product sold by BCBSM or any other healthcare payor.



(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.

(c) 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 16<sup>th</sup> 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:

FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s Ryan Danks  
Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
ryan.danks@usdoj.gov  
Illinois Bar #6277334

FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN

/s with consent of D. Bruce Hoffman  
D. Bruce Hoffman  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006  
202-955-1500  
bhoffman@hunton.com  
Adm. E.D.Mich., DC Bar # 495385

United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, MI 48226

FOR PLAINTIFF STATE OF MICHIGAN

/s with the consent of M. Elizabeth Lippett  
M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
LippittE@michigan.gov  
P-70373

APPENDIX A

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

UNITED STATES OF AMERICA and the STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 2:10cv14155-DPH-MKM
	)	Judge Denise Page Hood
BLUE CROSS BLUE SHIELD OF MICHIGAN,	)	Magistrate Judge Mona K. Majzoub
	)	
Defendant.	)	

AGREEMENT CONCERNING CONFIDENTIALITY

I, \_\_\_\_\_, am employed as \_\_\_\_\_  
by \_\_\_\_\_. I hereby certify that:

1. I have read the Stipulated Protective Order Concerning Confidentiality ("Protective Order") entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order and agree to use information, designated as Confidential Information, provided to me only for the purpose of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.
4. I submit to the jurisdiction of the United States District Court for the Eastern District of Michigan solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.
5. I make this certificate this \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

\_\_\_\_\_  
(SIGNATURE)

**EXHIBIT 4**

**Patrick B. Green**

---

**From:** Metnick, Carolyn <Carolyn.Metnick@btlaw.com>  
**Sent:** Wednesday, December 14, 2011 5:42 PM  
**To:** Patrick B. Green  
**Cc:** Albers, Daniel  
**Subject:** SCH - Subpoena from BCBS of Michigan

Patrick:

This email correspondence memorializes my communication from our phone conversation this afternoon regarding the subpoena issued on behalf of your client, Blue Cross Blue Shield of Michigan ("BCBS"), to our client, St. Catherine Hospital ("SCH").

Notwithstanding the limitations on the production that BCBS has offered, SCH will not comply with the subpoena on the grounds that it is not valid on its face, as the subpoena requires SCH, a non-party, to produce the requested documents at a location that is outside the 100-mile limit set forth in FRCP 45.

Additionally, and of primary concern to SCH, is the breadth of the request. Even with the limitation that BCBS has offered on the production, the breadth is such that it would impose an undue burden on SCH. As you know, the information requested is highly confidential and proprietary. While we understand from you that any documents produced could be limited to "attorneys' eyes only," this does not sufficiently alleviate our concerns about producing such sensitive information - especially when SCH is not a party, has no relationship with BCBS, does not compete for business in Michigan and would only be producing documents to purportedly serve as a control group for the preparation of the defense. Additionally, compiling the requested information, even as limited, would subject SCH to undue burden and significant expense.

Should you wish to discuss this further, please feel free to contact me.

Carolyn Victoria Metnick  
**BARNES & THORNBURG LLP** | Suite 4400, One North Wacker Drive, Chicago, IL 60606-2833  
Direct: 312-214-8830 | Main: 312-357-1313 | Fax: 312-759-5646 | [cmetnick@btlaw.com](mailto:cmetnick@btlaw.com)  
Visit B&T's Healthcare Blog at [www.bthealthlaw.com](http://www.bthealthlaw.com)

CONFIDENTIALITY NOTICE: This email and any attachments are for the exclusive and confidential use of the intended recipient. If you are not the intended recipient, please do not read, distribute or take action in reliance upon this message. If you have received this in error, please notify us immediately by return email and promptly delete this message and its attachments from your computer system. We do not waive attorney-client or work product privilege by the transmission of this message. TAX ADVICE NOTICE: Tax advice, if any, contained in this e-mail does not constitute a "reliance opinion" as defined in IRS Circular 230 and may not be used to establish reasonable reliance on the opinion of counsel for the purpose of avoiding the penalty imposed by Section 6662A of the Internal Revenue Code. The firm provides reliance opinions only in formal opinion letters containing the signature of a partner.

**EXHIBIT 5**

**Patrick B. Green**

---

**From:** Metnick, Carolyn <Carolyn.Metnick@btlaw.com>  
**Sent:** Thursday, January 26, 2012 12:57 PM  
**To:** Patrick B. Green  
**Cc:** Delgado, Heather  
**Subject:** SCH - BCBS of MI Subpoena

Patrick:

Notwithstanding BCBS of Michigan's willingness to narrow its subpoena request to St. Catherine Hospital ("SCH") as discussed, SCH will not produce the requested information and documentation for the reasons previously discussed and stated in my email to you dated December 14, 2011. While we note your willingness to cure the procedural deficiencies, the fact is that SCH is not a party to the litigation, has no relationship with BCBS of Michigan and does not compete for business in Michigan. Moreover, SCH would only be producing its highly proprietary documents to purportedly serve as a control group. Without even considering the costs and burden in compiling the information, the risks in producing it under these circumstances are too great.

Should you wish to discuss this further, please do not hesitate to contact me.

Carolyn Victoria Metnick  
**BARNES & THORNBURG LLP** | Suite 4400, One North Wacker Drive, Chicago, IL 60606-2833  
Direct: 312-214-8830 | Main: 312-357-1313 | Fax: 312-759-5646 | [cmetnick@btlaw.com](mailto:cmetnick@btlaw.com)

CONFIDENTIALITY NOTICE: This email and any attachments are for the exclusive and confidential use of the intended recipient. If you are not the intended recipient, please do not read, distribute or take action in reliance upon this message. If you have received this in error, please notify us immediately by return email and promptly delete this message and its attachments from your computer system. We do not waive attorney-client or work product privilege by the transmission of this message. TAX ADVICE NOTICE: Tax advice, if any, contained in this e-mail does not constitute a "reliance opinion" as defined in IRS Circular 230 and may not be used to establish reasonable reliance on the opinion of counsel for the purpose of avoiding the penalty imposed by Section 6662A of the Internal Revenue Code. The firm provides reliance opinions only in formal opinion letters containing the signature of a partner.

**EXHIBIT 6**



100 WOODWARD AVENUE, SUITE 4000  
DETROIT, MI 48226-3425  
TELEPHONE: (313) 223-3500  
FACSIMILE: (313) 223-3598  
<http://www.dickinsonwright.com>

PATRICK B. GREEN  
[PGreen@dickinsonwright.com](mailto:PGreen@dickinsonwright.com)  
(313) 223-3148

January 25, 2012

**VIA FIRST CLASS DELIVERY**

Carolyn Metnick  
Barnes & Thornburg LLP  
One Wacker Drive, Suite 4400  
Chicago, IL 60606-2833

Re: *United States v. Blue Cross Blue Shield of Michigan*,  
No. 10-cv-14155-DPH-MKM (E.D. Mich.)

Dear Carolyn:

This letter follows our conversation this morning regarding further limitations to the scope of the subpoena Blue Cross Blue Shield of Michigan ("Blue Cross") served on St. Catherine Hospital, Inc. (the "Hospital") in the above-reference matter in order to minimize the burden on the Hospital in responding to the same.

As you recall, on December 7, 2011, I provided an explanation of the categories of documents requested in the subpoena and we discussed various ways that Blue Cross was willing to work with the Hospital to reduce the overall burden of responding to the subpoena. Specifically, I advised that:

- (1) Blue Cross is willing to agree that the Hospital may target its search for responsive documents to the key custodians most likely to have relevant documents to the requests, so long as that by narrowing its search to such custodians, the hospital does not ignore and fail to produce responsive and relevant documents that it knows a non-key custodian has.
- (2) Blue Cross is willing to agree that the Hospital can run key word searches on active emails, provided we can review and comment on the key words first. Blue Cross does not seek to have the hospital go into archived electronic or offsite paper storage to collect documents.
- (3) Blue Cross is willing to accept a search of those files that the hospital knows contains the responsive documents, and not require a search for "all documents." If a document that was not produced in the search refers to another responsive document that was not produced, however, Blue Cross, reserves the right to ask the hospital to produce the referenced document, and related documents.

Carolyn Metnick  
January 25, 2012  
Page 2

- (4) Although Blue Cross seeks documents dated back to 2003 to gain an understanding of reimbursement shortly before the first MFNs were negotiated, Blue Cross does not ask the hospital to search archived files to find all documents going back to 2003. Blue Cross asks only that the Hospital produce documents going back to that time frame if they are in active or onsite files.

Further, the table below summarizes Blue Cross's document requests into the broad categories we discussed:

Category	Blue Cross Document Categories and Request #s
A	Hospital Contracting and Negotiations with Payors, generally--Requests 1, 2, 4, 13, and 14.
B	Documents specifically referencing MFNs--Requests 3, 19, and 20.
C	Hospital Costs and Need for Rate Increases--Requests 5, 7, 9, 18, 21, 22, and 23.
D	Hospital Documents Comparing Payors--Requests 6, 8, and 15.
E	Hospital's Knowledge about How Payor Rates Affect Insurance Product Prices--Request 24.
F	Hospital's Competitors and Service Area--Requests 10, 11, 12, 16 and 17.
G	Communications with DOJ--Request 19.

Finally, I advised that the Hospital's production of documents in response of the subpoena will be governed by and subject to the terms of the previously provided Confidentiality Order entered in this case.

Notwithstanding the foregoing limitations to the scope of the subpoena, you advised that the Hospital does not intend to comply with the subpoena. You otherwise stated that should Blue Cross further limit the scope of the subpoena to specific documents to be produced, you would discuss such a production with the Hospital.

Accordingly, today we discussed Blue Cross's willingness to further limit the Hospital's response to the subpoena to the production of the following documents:

- (1) the Hospital's audited financial statements from 2005 to the present;
- (2) the Hospital's board minutes from 2005 to the present, particularly those that address the Hospital's costs and/or need for rate increases (as

DICKINSON WRIGHT PLLC

Carolyn Metnick  
January 25, 2012  
Page 3

discussed, in the event the Hospital does not want to parse through its board minutes to find the subset dealing with costs and rate increases, Blue Cross will accept a production of all board minutes from this time period);

- (3) documents identifying the amount of money the Hospital receives from each payor; and
- (4) the Hospital's contracts and negotiation files with its payors.

Per our agreement, I will expect to touch base with you later this week or early next week after you have had the opportunity to discuss the foregoing with the Hospital. We look forward to continuing to work with you to assist the Hospital in responding to Blue Cross's subpoena. Thank you.

Very truly yours,



Patrick B. Green

PBG

**EXHIBIT 7**



(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

2:10-cv-14155-DPH-MKM Doc # 36 Filed 03/16/11 Pg 10 of 12 Pg ID 1322

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 16<sup>th</sup> 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:

FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s Ryan Danks  
Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
ryan.danks@usdoj.gov  
Illinois Bar #6277334

FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN

/s with consent of D. Bruce Hoffman  
D. Bruce Hoffman  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006  
202-955-1500  
bhoffman@hunton.com  
Adm. E.D.Mich., DC Bar # 495385

United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, MI 48226

FOR PLAINTIFF STATE OF MICHIGAN

/s with the consent of M. Elizabeth Lippitt  
M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
LippittE@michigan.gov  
P-70373

APPENDIX A

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

_____	)	
UNITED STATES OF AMERICA and the	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 2:10cv14155-DPH-MKM
	)	Judge Denise Page Hood
BLUE CROSS BLUE SHIELD OF	)	Magistrate Judge Mona K. Majzoub
MICHIGAN,	)	
	)	
Defendant.	)	
_____	)	

**AGREEMENT CONCERNING CONFIDENTIALITY**

I, \_\_\_\_\_, am employed as \_\_\_\_\_  
by \_\_\_\_\_. I hereby certify that:

1. I have read the Stipulated Protective Order Concerning Confidentiality ("Protective Order") entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order and agree to use information, designated as Confidential Information, provided to me only for the purpose of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.
4. I submit to the jurisdiction of the United States District Court for the Eastern District of Michigan solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.
5. I make this certificate this \_\_\_\_ day of \_\_\_\_\_, 201\_.

\_\_\_\_\_  
(SIGNATURE)

**EXHIBIT 8**



(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.

**G. PROTECTED HEALTH INFORMATION**

16. Confidential Information (as defined in paragraph A(1)(a)) expressly includes Protected Health Information ("PHI"), as that term is defined by the Health Insurance Portability and Accountability Act ("HIPAA"), 45 C.F.R. Parts 160 and 164.

17. Confidential Information that includes PHI produced by any Protected Person to Plaintiffs or Defendant may be produced by delivery of an encrypted mass storage device, such as a hard drive, DVD, floppy disk, "jump" drive, or thumb drive. Confidential Information also expressly includes any decryption keys, passwords, or the like used by any Person to secure or encrypt Confidential Information that includes PHI. Confidential Information also expressly includes the individual electronic records or files contained in encrypted mass storage media used to produce PHI. Confidential Information also expressly includes any records or files containing PHI that are unencrypted and thereby reduced, transferred, saved, or re-encrypted in any other medium by any Person. (Examples of such records or files may include, by way of description and not limitation, paper copies or printouts, facsimiles, unencrypted files, or other mass storage devices upon which such Confidential Information may be stored or located.)

18. Any Person in possession of Confidential Information shall treat that Confidential Information in accordance with the terms of this Order for the entire period of time such Person remains in possession or maintains such Confidential Information, regardless of whether or not that period extends beyond the time period specified in Section E.

19. The procedures for the protection of Confidential Information as set forth herein provide sufficient protection such that this Order meets the requirements for a “qualified protective order” under HIPAA, 45 CFR 164.512(e)(1)(v).

20. Those Persons who have signed the acknowledgement of the Protective Order prior to its amendment to include expressly PHI as Confidential Information shall be provided with a copy of this Order, as amended. The failure of any such Person to object within ten days of receipt of the amended Order shall be deemed to be agreement to comply with the terms of the Order as amended.

**SO ORDERED:**

Dated at Detroit, Michigan, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

BY THE COURT:

\_\_\_\_\_  
U.S. District Judge

Stipulated for form and entry by:

FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s Ryan Danks  
Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
ryan.danks@usdoj.gov  
Illinois Bar #6277334

FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN

/s with consent of D. Bruce Hoffman  
D. Bruce Hoffman  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006  
202-955-1500  
bhoffman@hunton.com  
Adm. E.D.Mich., DC Bar # 495385

United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, MI 48226

FOR PLAINTIFF STATE OF MICHIGAN

/s with the consent of M. Elizabeth Lippitt  
M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
LippittE@michigan.gov  
P-70373

APPENDIX A

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

_____ )	
UNITED STATES OF AMERICA and the )	
STATE OF MICHIGAN, )	
)	
) Plaintiffs, )	
)	
) v. )	Civil Action No. 2:10cv14155-DPH-MKM
)	Judge Denise Page Hood
BLUE CROSS BLUE SHIELD OF )	Magistrate Judge Mona K. Majzoub
MICHIGAN, )	
)	
) Defendant. )	
_____ )	

**AGREEMENT CONCERNING CONFIDENTIALITY**

I, \_\_\_\_\_, am employed as \_\_\_\_\_  
by \_\_\_\_\_. I hereby certify that:

1. I have read the Stipulated Protective Order Concerning Confidentiality ("Protective Order") entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order and agree to use information, designated as Confidential Information, provided to me only for the purpose of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.
4. I submit to the jurisdiction of the United States District Court for the Eastern District of Michigan solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.
5. I make this certificate this \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

\_\_\_\_\_  
(SIGNATURE)

**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**

Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
Michelle L. Alamo (P60684)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

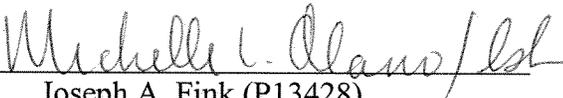
Todd M. Stenerson (P51953)  
Marty Steinberg (DC Bar 996403)  
Bruce Hoffman (Adm. MI, DC Bar 495385)  
David Higbee (DC Bar 500605)  
Neil K. Gilman (Adm. MI, DC Bar 449226)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
202-955-1500  
tstenerson@hunton.com

Robert A. Phillips (P58496)  
BLUE CROSS BLUE SHIELD OF MICHIGAN  
600 Lafayette East, MC 1925  
Detroit, MI 48226  
313-225-0536  
rphillips@bcbsm.com

**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, upon the Cleveland Clinic May 15, 2012 or as soon thereafter as service may be effectuated.

Respectfully submitted,

By:   
Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
Michelle L. Alamo (P60684)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

Dated: May 15, 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

Northern District of Ohio

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: Custodian of The Records; Cleveland Clinic 9500 Euclid Avenue; Cleveland, Ohio 44915

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: Michelle Alamo) 500 Woodward Ave., Ste. 4000 Detroit, MI 48226-3425 Date and Time: 05/31/2012 9:00 am

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: 05/15/2012

CLERK OF COURT

Signature of Clerk or Deputy Clerk

OR

Michelle L. Alamo 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:

Michelle L. Alamo (P60684); Dickinson Wright PLLC 500 Woodward Ave., Ste. 4000; Detroit, MI 48226-3425; 313-223-3500 -- Email: malamo@dickinsonwright.com

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).

## **ATTACHMENT A**

### **DEFINITIONS**

- A. "You," "Your" or "Your Hospital" refers to the Cleveland Clinic, its parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all its directors, officers, employees, agents, and representatives.
- B. "BCBSM" refers to Blue Cross Blue Shield of Michigan.
- C. "Healthcare payor" refers to any entity, other than BCBSM, that finances or reimburses the cost of personal health services, including but not limited to managed care companies, insurance carriers, providers of administrative services only, and governmental payors, such as Medicare.
- D. "MFN" refers to any most favored nation, most favored discount, or most favored pricing provision in any agreement you have with BCBSM or any other healthcare payor.
- E. "DRG" codes refers to diagnosis related groups codes used to describe hospital services.
- F. "CPT" codes refers to the current procedural terminology codes used to describe medical, surgical, and diagnostic services.
- G. "Document" is synonymous in meaning and scope to that term in Federal Rule of Civil Procedure 45(a)(1)(A)(iii), and includes electronically stored information, such as written, recorded or graphic matter, or computer or electronic records of written, recorded or graphic matter, of every type or description in your possession, custody, or control, whether an original or draft, wherever located. The term includes each copy that is not identical to any other copy.

### **INSTRUCTIONS**

- A. These Document Requests incorporate the instructions set forth in Federal Rule of Civil Procedure 45.
- B. Unless otherwise indicated, this subpoena seeks documents covering the period January 1, 2003 to the date of this subpoena.

### **SCHEDULE OF REQUESTED DOCUMENTS**

- 1. All documents describing your managed care contracting strategy.
- 2. All documents, including but not limited to communications, concerning or reflecting your negotiations with any healthcare payor for reimbursement of your services, including correspondence, letters of understanding, term sheets, draft and final contracts, internal notes, and meeting minutes, regardless of whether you reached a final agreement.

3. All documents concerning or reflecting any negotiations you had with any healthcare payor concerning any MFN provision, whether the MFN provision was agreed upon or not.
4. All documents concerning or reflecting any negotiations you had with any healthcare payor concerning any market-based pricing or market-based pricing provisions, whether the provision was agreed upon or not.
5. All documents describing your need or desire for rate increases from any healthcare payor.
6. All documents comparing your pricing or reimbursement rates charged to healthcare payors, whether between or among each other and/or BCBSM.
7. Documents reflecting your chargemaster.
8. All documents concerning or reflecting your utilization rate of any healthcare payor and/or BCBSM.
9. All documents reflecting how reimbursement rates relate in any way to the cost of any health insurance product sold by BCBSM or a commercial insurer.
10. Documents showing all hospitals, including in particular Michigan hospitals, against which you compete on any level, including but not limited documents showing your competing services.
11. Documents concerning or reflecting the substitutability of your hospital with those other hospitals, including in particular Michigan hospitals, against which you compete.
12. Documents sufficient to show: (a) your hospital's primary service area and secondary service area; (b) the methodology used to define those service areas; and (c) your competitors in the provision of hospital services in those areas.
13. Documents showing the healthcare payors with which you contract.
14. Documents showing the discounts or pricing that you have negotiated with the healthcare payors with which you contract.
15. Documents concerning or reflecting the substitutability of healthcare payors, whether between or among each other and/or BCBSM.
16. All documents concerning or reflecting your plans or strategy for competing with other hospitals, including but not limited to hospitals that have captive healthcare payors.
17. Documents showing the geographic areas from which you receive patients, including but not limited to your patients' zip codes.
18. All documents showing uncompensated care statistics.

19. All documents reflecting any communications between you and anyone from the U.S. Department of Justice regarding this litigation in any way or regarding MFNs, whether as used by BCBSM or any other entity.
20. All documents concerning or reflecting any effort to enforce any MFN provision or other provision to provide the best price, whether with BCBSM or any healthcare payor.
21. All documents related to any price increase to any healthcare payor.
22. All documents related to any requested price increase to any healthcare payor.
23. All documents showing how you address Medicare and Medicaid shortfalls and how the costs of these shortfalls are spread among other healthcare payors.
24. All documents reflecting how reimbursement rates relate in any way to the cost of any health insurance product sold by BCBSM or any other healthcare payor.

DETROIT 19276-133 1247274v1

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

<hr/>		)	
UNITED STATES OF AMERICA and the		)	
STATE OF MICHIGAN,		)	
		)	
	Plaintiffs,	)	
		)	
	v.	)	Civil Action No. 2:10cv14155-DPH-MKM
		)	Judge Denise Page Hood
BLUE CROSS BLUE SHIELD OF		)	Magistrate Judge Mona K. Majzoub
MICHIGAN,		)	
		)	
	Defendant.	)	
<hr/>		)	

**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 16<sup>th</sup> 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:

FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s Ryan Danks

Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
ryan.danks@usdoj.gov  
Illinois Bar #6277334

FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN

/s with consent of D. Bruce Hoffman

D. Bruce Hoffman  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006  
202-955-1500  
bhoffman@hunton.com  
Adm. E.D.Mich., DC Bar # 495385

United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, MI 48226

FOR PLAINTIFF STATE OF MICHIGAN

/s with the consent of M. Elizabeth Lippitt

M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
LippittE@michigan.gov  
P-70373





500 WOODWARD AVENUE, SUITE 4000  
DETROIT, MI 48226-3425  
TELEPHONE: (313) 223-3500  
FACSIMILE: (313) 223-3598  
<http://www.dickinsonwright.com>

MICHELLE L. ALAMO  
MAlamo@dickinsonwright.com  
(313) 223-3875

May 15, 2012

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Cleveland Clinic  
Custodian of the Record  
9500 Euclid Avenue  
Cleveland, Ohio 44195

Re: *United States v. Blue Cross Blue Shield of Michigan*,  
No. 10-cv-14155-DPH-MKM (E.D.Mich.)

Dear Custodian of the Record:

Blue Cross Blue Shield of Michigan's non-party subpoena, issued pursuant to Fed. R. Civ. P. 45 in the above-referenced matter, is enclosed. This subpoena requires the Cleveland Clinic to produce certain documents, which are identified in Attachment A to the subpoena. The production of documents in this case is governed by the terms of the enclosed Confidentiality Order.

After you have reviewed the enclosed subpoena, if you have any questions regarding the scope or the type of documents requested, please feel free to contact Michelle Heikka at Dickinson Wright PLLC at 313-223-3126. Further, if you have a conflict with the date or manner of the production, please communicate with Ms. Heikka to discuss a mutually agreeable date and time to proceed. Also, we would be happy to furnish you with a pre-paid means of providing copies of relevant documents to us.

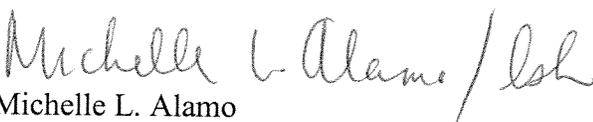
Please direct all documents produced in response to the subpoena to:

Michelle L. Alamo  
Dickinson Wright PLLC  
500 Woodward Avenue  
Suite 4000  
Detroit, Michigan 48226-3425

Cleveland Clinic  
May 15, 2012  
Page 2

Finally, please note that we are continuing to formulate our request for certain data and financial information and reserve the right to supplement this subpoena for that information at a later date.

Very truly yours,

  
Michelle L. Alamo

MLA:lm

**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**

Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
Farayha J. Arrine (P73535)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

Todd M. Stenerson (P51953)  
Marty Steinberg (DC Bar 996403)  
Bruce Hoffman (Adm. MI, DC Bar 495385)  
David Higbee (DC Bar 500605)  
Neil K. Gilman (Adm. MI, DC Bar 449226)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
202-955-1500  
tstenerson@hunton.com

Robert A. Phillips (P58496)  
BLUE CROSS BLUE SHIELD OF MICHIGAN  
600 Lafayette East, MC 1925  
Detroit, MI 48226  
313-225-0536  
rphillips@bcbsm.com

**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 Assurant Health 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 5<sup>th</sup> Street, N.W.  
Washington, D.C. 20001  
[Amy.fitzpatrick@usdoj.gov](mailto:Amy.fitzpatrick@usdoj.gov)

**Attorneys for the State of Michigan**

M. Elizabeth Lippitt  
Michigan Department of Attorney  
G. Mennen Williams Bldg., 6<sup>th</sup> Floor  
525 W. Ottawa Street  
Lansing, MI 48933  
[lippitte@michigan.gov](mailto:lippitte@michigan.gov)

**Attorneys in the related private civil matters**

Mary Jane Fait: [fait@whafh.com](mailto:fait@whafh.com)  
John Tangren: [tangren@whafh.com](mailto:tangren@whafh.com)  
Daniel Small: [dsmall@cohenmilstein.com](mailto:dsmall@cohenmilstein.com)  
Besrat Gebrewold: [bgebrewold@cohenmilstein.com](mailto:bgebrewold@cohenmilstein.com)  
Dan Hedlund: [dhedlund@gustafsongluek.com](mailto:dhedlund@gustafsongluek.com)  
Casey Fry: [caf@millerlaw.com](mailto:caf@millerlaw.com)  
Jason J. Thompson: [jthompson@sommerspc.com](mailto:jthompson@sommerspc.com)  
Lance C. Young: [lyoung@sommerspc.com](mailto:lyoung@sommerspc.com)  
Thomas Marks: [markst@michigan.gov](mailto: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

Eastern District of Wisconsin

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: Assurant Health, 501 West Michigan Street, Milwaukee, WI 53201

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.

Table with 2 columns: Place (Dickinson Wright PLLC) and 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...

Table with 2 columns: Place and Date and Time (empty)

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

Handwritten signature of Todd M. Stenerson, Attorney's signature by DMC

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.



(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 16<sup>th</sup> 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:

FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s Ryan Danks

Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
ryan.danks@usdoj.gov  
Illinois Bar #6277334

FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN

/s with consent of D. Bruce Hoffman

D. Bruce Hoffman  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006  
202-955-1500  
bhoffman@hunton.com  
Adm. E.D.Mich., DC Bar # 495385

United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, MI 48226

FOR PLAINTIFF STATE OF MICHIGAN

/s with the consent of M. Elizabeth Lippitt

M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
LippittE@michigan.gov  
P-70373

APPENDIX A

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

_____	)	
UNITED STATES OF AMERICA and the	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 2:10cv14155-DPH-MKM
	)	Judge Denise Page Hood
BLUE CROSS BLUE SHIELD OF	)	Magistrate Judge Mona K. Majzoub
MICHIGAN,	)	
	)	
Defendant.	)	
_____	)	

**AGREEMENT CONCERNING CONFIDENTIALITY**

I, \_\_\_\_\_, am employed as \_\_\_\_\_  
by \_\_\_\_\_. I hereby certify that:

1. I have read the Stipulated Protective Order Concerning Confidentiality (“Protective Order”) entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order and agree to use information, designated as Confidential Information, provided to me only for the purpose of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.
4. I submit to the jurisdiction of the United States District Court for the Eastern District of Michigan solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.
5. I make this certificate this \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

\_\_\_\_\_  
(SIGNATURE)

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

Eastern District of Michigan

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: )

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

To: Michigan Association of Health Plans (registered agent: Richard B. Murdock) 327 Seymour Avenue, Lansing, MI 48933

**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:  03/09/2012 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: 02/16/2012

CLERK OF COURT

OR

\_\_\_\_\_  
Signature of Clerk or Deputy Clerk

*Todd M Stenerson*  
\_\_\_\_\_  
Attorney's signature by DMK

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).

## **ATTACHMENT A**

### **DEFINITIONS**

1. The term "BCBSM" means Blue Cross and Blue Shield of Michigan, including Blue Care Network.
2. 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.
3. 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.
4. The term "PA 350" means the Nonprofit Health Care Corporation Reform Act, Mich. Comp. Laws §§ 550.1101 to 1704.
5. The term "Provider" means any person who supplies health care services, including any hospital, physician or physician group, laboratory, surgical center or nursing facility.
6. 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, with any Provider which sets forth rates, terms and conditions governing the payment or reimbursement of fees to a Provider for health care services.
7. 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. Documents discussing any MFN or Market Based Discount in any Provider Agreement between a Michigan hospital and either BCBSM or any other health insurer, including any documents discussing the terms of any such MFN or Market Based Discount, the reasons for including such MFN or Market Based Discount in the agreement, and the actual or potential effects of such MFN or Market Based Discount.
2. Documents showing any communications between you and any of your members discussing any MFN or Market Based Discount contained in any Provider Agreement with BCBSM, or in any Provider Agreement with any HMO or health insurer other than BCBSM.
3. Documents discussing cost shifting from government funded medical insurance programs (*e.g.* Medicare or Medicaid) to hospitals and health insurers, including documents discussing differences between the payments Michigan hospitals receive from such government programs and the payments Michigan hospitals receive from other health insurers and health plans.
4. Documents discussing the impact of lower reimbursements paid by government funded medical insurance programs (*e.g.* Medicare or Medicaid) on the financial condition of Michigan hospitals or on reimbursement rates paid by health insurers and health plans to Michigan hospitals.
5. Documents discussing the impact of uncompensated care amounts from uninsured persons on the financial condition of Michigan hospitals or on reimbursement rates paid by health insurers and health plans to Michigan hospitals.
6. Documents discussing any belief or position by You or any of Your members that BCBSM is responsible for covering any shortfall from (i) reimbursement amounts paid by government funded medical insurance programs (*e.g.* Medicare or Medicaid) to Michigan hospitals, or (ii) any uncompensated care amounts from uninsured persons, and any documents discussing the basis for such position or belief.
7. Documents discussing any position by You or Your members on whether commercial insurers other than BCBSM should cover, or are responsible for covering, any shortfall from (i) reimbursement amounts paid by government funded medical insurance programs (*e.g.* Medicare or Medicaid) to Michigan hospitals, or (ii) any uncompensated care amounts from uninsured persons, and any documents discussing the basis for such position.

8. Documents discussing the factors that affect health insurance premiums, including the costs of hospital services, physician services, prescription drugs, home health services, or medical equipment, as well as factors such as the degree of competition in the market, consumer choices, medical plan design or other factors.

9. Documents discussing increases in health insurance premiums and the reasons for such increases, including any increases in the costs of hospital services, physician services, prescription drugs, home health services, and or medical equipment.

10. Documents discussing increases in reimbursement rates paid by health insurers or health plans to hospitals or other Providers, including any documents discussing the effects of any such increases on the premiums or rates charged for health insurance.

11. Documents discussing the rising cost of health care services, including the cost of hospital services, physician services, prescription drugs, home health services, and or medical equipment and the reasons for such rising costs.

12. Documents discussing competition for the sale of health insurance to customers located in Michigan, including any documents discussing any difficulty or barrier any health insurer or plan faces in expanding its business in Michigan.

13. Documents discussing competition between different types of health insurance products (*e.g.* HMO, PPO, traditional indemnity plan, etc.) or health benefit plans, including documents discussing customers' or beneficiaries' choices between types of plans and changes over time in consumer preferences for benefit plan types.

14. Documents discussing competition in each of the various customer segments of the health insurance market, including competition for the sale of individual policies, and competition for small, medium and large group customers.

15. Documents discussing health insurance plans offered to customers on a self-insured or self-funded basis.

16. Documents discussing the inclusion or exclusion of any Michigan hospital from the Provider network of any health insurance company or health plan doing business in Michigan, including any documents discussing the reasons for inclusion or exclusion and how such inclusion or exclusion affected competition for the sale of health insurance in Michigan.

17. Documents discussing hospital, physician or other medical service provider rental networks, including documents discussing the ability of Michigan health insurers to access such networks and the effect of access (or lack thereof) to such networks on the ability of health insurers or health plans to compete for the sale of health insurance in Michigan.

18. Documents discussing the decision by any health insurer or health plan to terminate or not enter into a Provider Agreement with any Michigan hospital.

19. Documents discussing the effect of differences in the statutes and regulations governing BCBSM (*i.e.* PA 350) and the statutes and regulations governing other Michigan health insurers (*i.e.* The Insurance Code of 1956), on competition for the sale of health insurance in Michigan, including documents discussing any commercial advantages or disadvantages for BCBSM or any differences in premium rating practices.

20. Documents discussing the geographic area (or areas) in which health insurers or health plans compete for business in Michigan, including any documents discussing any difficulty or barrier any health insurer or plan faces in expanding the geographic area in which it competes.

21. Documents discussing the entry into, or exit from, any geographic area that includes Michigan by any health insurer or health plan, including any plans to expand or reduce the type of health insurance products (*e.g.* HMO, PPO, traditional indemnity plan, etc.) or health benefit plans offered by any insurer or plan in any such area.

22. Documents discussing the entry into, or exit from, any customer segment of the health insurance market (*e.g.* individual, small, medium or large group, or self-insured health plans), by any health insurer in Michigan, including any plans to expand or reduce sales to any such customer segment.

23. Documents discussing 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.

24. Documents discussing competition for the sale of health insurance in Michigan by any health insurer, health benefits plan or HMO for which a hospital or health system has an ownership interest in such health insurer, health benefits plan or HMO, including documents discussing the effect of such ownership interest on reimbursement rates paid by such health insurer, health benefits plan or HMO.

25. Documents showing the market shares of any competitor for the sale of health insurance in Michigan, including documents discussing market shares for different types of health insurance products (*e.g.* HMO, PPO, traditional indemnity plan, etc.), or market shares within any customer segment (*e.g.* individual, small medium or large group, or self-insured).

26. Documents discussing BCBSM's Participating Hospital Agreement (PHA), including any documents concerning the participation of any of Your members in that or a similar agreement, or in the development, drafting, revision, preparation, or analysis of that or a similar agreement.

27. Documents discussing Your communications with the Michigan Office of Financial and Insurance Regulation ("OFIR" or any predecessor to such agency) concerning competition for the sale of health insurance in Michigan, or any complaints about the methods by

which BCBSM competes for such sales, including all documents reflecting the development of any MAHP position paper or other communications submitted to OFIR.

28. Documents reflecting communications you or your members have had with the Department of Justice, the State of Michigan, or any other person concerning any investigation being conducted by either DOJ or the State of Michigan into BCBSM's contracting practices (including the use of MFNs) prior or subsequent to the filing of this lawsuit, including e-mails, white papers, or correspondence provided to the DOJ or the State of Michigan, and any documents concerning any meetings or telephone calls you or your members had with the DOJ or the State of Michigan on that subject including documents sufficient to identify all persons participating in such communications or meetings.

29. All meeting minutes, agendas, presentations and consulting reports, including drafts thereof, that mention BCBSM as it relates to any topic encompassed in Requests 1 through 28, above.



(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 16<sup>th</sup> 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:

FOR PLAINTIFF  
UNITED STATES OF AMERICA

/s Ryan Danks  
Ryan Danks  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
450 Fifth Street, N.W., Suite 4100  
Washington, D.C. 20530  
(202) 305-0128  
ryan.danks@usdoj.gov  
Illinois Bar #6277334

FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN

/s with consent of D. Bruce Hoffman  
D. Bruce Hoffman  
Hunton & Williams LLP  
1900 K Street, N.W.  
Washington, DC 20006  
202-955-1500  
bhoffman@hunton.com  
Adm. E.D.Mich., DC Bar # 495385

United States Attorney's Office  
Eastern District of Michigan  
211 W. Fort Street  
Suite 2001  
Detroit, MI 48226

FOR PLAINTIFF STATE OF MICHIGAN

/s with the consent of M. Elizabeth Lippitt  
M. Elizabeth Lippitt  
Assistant Attorney General  
G. Mennen Williams Building, 6th Floor  
525 W. Ottawa Street  
Lansing, Michigan 48933  
(517) 373-1160  
LippittE@michigan.gov  
P-70373

APPENDIX A

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

_____	)	
UNITED STATES OF AMERICA and the	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 2:10cv14155-DPH-MKM
	)	Judge Denise Page Hood
BLUE CROSS BLUE SHIELD OF	)	Magistrate Judge Mona K. Majzoub
MICHIGAN,	)	
	)	
Defendant.	)	
_____	)	

**AGREEMENT CONCERNING CONFIDENTIALITY**

I, \_\_\_\_\_, am employed as \_\_\_\_\_  
by \_\_\_\_\_. I hereby certify that:

1. I have read the Stipulated Protective Order Concerning Confidentiality (“Protective Order”) entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order and agree to use information, designated as Confidential Information, provided to me only for the purpose of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.
4. I submit to the jurisdiction of the United States District Court for the Eastern District of Michigan solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.
5. I make this certificate this \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

\_\_\_\_\_  
(SIGNATURE)

**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**

Joseph A. Fink (P13428)  
Thomas G. McNeill (P36895)  
Farayha J. Arrine (P73535)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, Michigan 48226  
313-223-3500  
jfink@dickinsonwright.com

Todd M. Stenerson (P51953)  
Marty Steinberg (DC Bar 996403)  
Bruce Hoffman (Adm. MI, DC Bar 495385)  
David Higbee (DC Bar 500605)  
Neil K. Gilman (Adm. MI, DC Bar 449226)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
202-955-1500  
tstenerson@hunton.com

Robert A. Phillips (P58496)  
BLUE CROSS BLUE SHIELD OF MICHIGAN  
600 Lafayette East, MC 1925  
Detroit, MI 48226  
313-225-0536  
rphillips@bcbsm.com

**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 Michigan Association of Health Plans on February 16, 2012 or as soon thereafter as service may be effectuated.

Dated: February 16, 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 16, 2012, I caused the foregoing Notice of Subpoena to be served via electronic mail upon:

**Attorneys for the United States**

Amy Fitzpatrick  
U.S. Department of Justice  
General  
Antitrust Division  
450 5<sup>th</sup> Street, N.W.  
Washington, D.C. 20001  
[Amy.fitzpatrick@usdoj.gov](mailto:Amy.fitzpatrick@usdoj.gov)

**Attorneys for the State of Michigan**

M. Elizabeth Lippitt  
Michigan Department of Attorney  
G. Mennen Williams Bldg., 6<sup>th</sup> Floor  
525 W. Ottawa Street  
Lansing, MI 48933  
[lippitte@michigan.gov](mailto:lippitte@michigan.gov)

**Attorneys in the related private civil matters**

Mary Jane Fait: [fait@whafh.com](mailto:fait@whafh.com)  
John Tangren: [tangren@whafh.com](mailto:tangren@whafh.com)  
Daniel Small: [dsmall@cohenmilstein.com](mailto:dsmall@cohenmilstein.com)  
Besrat Gebrewold: [bgebrewold@cohenmilstein.com](mailto:bgebrewold@cohenmilstein.com)  
Dan Hedlund: [dhedlund@gustafsongluek.com](mailto:dhedlund@gustafsongluek.com)  
Casey Fry: [caf@millerlaw.com](mailto:caf@millerlaw.com)  
Jason J. Thompson: [jthompson@sommerspc.com](mailto:jthompson@sommerspc.com)  
Lance C. Young: [lyoung@sommerspc.com](mailto:lyoung@sommerspc.com)  
Thomas Marks: [markst@michigan.gov](mailto: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 16, 2012

**DAN BABCOCK**  
**January 13, 2012**

1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al,  
Plaintiffs,

vs. Case No. 2:10-cv-14155-DPH-MKM

BLUE CROSS BLUE SHIELD  
OF MICHIGAN,  
Defendant.

---

The Videotaped Deposition of DAN BABCOCK,  
Taken at Marlette Regional Hospital, 2770 Main Street,  
Marlette, Michigan,  
Commencing at 9:41 a.m.,  
Friday, January 13, 2012,  
Before Lezlie A. Setchell, CSR-2404, RPR, CRR.

**DAN BABCOCK**

**January 13, 2012**

21

1 A. Okay.

2 **Q. Do you recall doing searches for both?**

3 A. Uh-huh, I do.

4 MR. STENERSON: Let me mark one other  
5 document, Blue Cross 180.

6 MARKED FOR IDENTIFICATION:

7 BLUE CROSS EXHIBIT 180

8 9:56 a.m.

9 BY MR. STENERSON:

10 **Q. And if you could identify Blue Cross 180 for me,**  
11 **please?**

12 A. This appears to be a letter from the Department of  
13 Justice to, at that point was our CEO, Greg Roraff.

14 **Q. And what is the date of Blue Cross 180?**

15 A. April 14th, 2010.

16 **Q. And do you recall a time when the hospital was**  
17 **searching for documents responsive to the government's**  
18 **request in the spring of 2010?**

19 A. I know that we submitted information to them, yes.

20 **Q. And during that period, did you have any direct**  
21 **contact with the Department of Justice?**

22 A. Yes, we did.

23 **Q. And did you -- were you interviewed or answer any**  
24 **questions over the phone by them at that time?**

25 A. Yes, we were.

**DAN BABCOCK**

**January 13, 2012**

22

1 Q. Who -- do you recall approximately when that  
2 conversation occurred?

3 A. I don't. I can't remember the dates, no.

4 Q. Do you know how many times you spoke to them about the  
5 substance?

6 MR. GRINGER: Object to form.

7 A. I believe it -- probably three or four times. I can't  
8 remember exactly.

9 BY MR. STENERSON:

10 Q. And during those three or four conversations with the  
11 government, do you recall who from the Department of  
12 Justice you spoke with?

13 A. I primarily spoke with Barry Joyce.

14 Q. And do you know if anyone else was on the department's  
15 side of the phone?

16 A. I believe one time that there was, but I don't know  
17 who, who that was.

18 Q. And what were the substance of the conversations you  
19 had with Mr. Joyce in the spring of 2010?

20 MR. GRINGER: Object to form.

21 MR. STENERSON: What's wrong with the form,  
22 counsel?

23 MR. GRINGER: I think the first part is it  
24 calls for a narrative, several conversations,  
25 compound, you know. Also, it's not clear whether

**DAN BABCOCK**

**January 13, 2012**

23

1           you're talking about in terms of substance, substance  
2           in terms of complying with the CID that's Blue  
3           Cross 180 or the substance in terms of something else,  
4           so a few objections there.

5                           MR. STENERSON: Okay.

6 BY MR. STENERSON:

7 **Q. You can answer.**

8 A. My conversations with Barry Joyce initially were just  
9 clarification of what items. We were not required to  
10 submit all of the items. So we talked through which  
11 ones they thought we should submit, and we did that,  
12 and then there were follow-up questions.

13 **Q. I'd like to focus not on the compliance with the doc  
14 request but on the follow-up questions.**

15 A. Okay.

16 **Q. What topics do you recall Mr. Joyce asking you about?**

17 A. Most of the things were centered around the MFN  
18 provisions.

19 **Q. And do you recall what Mr. Joyce asked you about the  
20 MFN provision?**

21 A. If we'd renegotiated any contracts with other payers  
22 because of that.

23 **Q. And what did you tell him?**

24 A. That we had.

25 **Q. Did you tell --**

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

-----	:	
UNITED STATES OF AMERICA and	:	
the STATE OF MICHIGAN,	:	
	:	Civil Action No.:
Plaintiffs,	:	
	:	1:10-CV-14155-DPH-MKM
vs.	:	Judge Denise Page Hood
	:	
BLUE CROSS BLUE SHIELD OF	:	
MICHIGAN,	:	
	:	Magistrate Judge
Defendants.	:	Mona K. Majzoub
-----	:	

Eaton Rapids, Michigan  
Monday, May 7, 2012

Confidential Deposition of:

TIMOTHY J. JOHNSON

was called for oral examination by counsel for  
Plaintiff, pursuant to Notice, at 1500 South Main  
Street, Eaton Rapids, Michigan, before Darlene D.  
Fuller, CSR, RPR, CRR, RMR, Capital Reporting Company,  
a Notary Public in and for the State of Michigan,  
beginning at 9:00 a.m., when were on behalf of the  
respective parties:

1 on attorneys so we didn't -- until we absolutely had **13:53:28:18**  
2 to, we didn't involve John.

3 Q. So did you have opportunity, then, to have  
4 direct conversations with the Department of Justice as  
5 part of the information collecting process? **13:53:39:15**

6 A. Yeah, we did. Yeah.

7 Q. And who at the Department of Justice did you  
8 primarily speak with?

9 A. With Ryan. Ryan.

10 Q. And that's Mr. Danks? **13:53:47:24**

11 A. Danks, yes.

12 Q. In any of those conversations did Mr. Danks  
13 explain to you what the Government's theory of  
14 liability was in this case?

15 A. No, huh-huh. **13:53:55:10**

16 Q. In any of those conversations, did Mr. Danks  
17 inform you that if the MFN is found to violate the  
18 anti-trust laws, it's possible that the hospital could  
19 be found to be a party to an illegal agreement?

20 MR. LIPTON: Objection to form. Lack **13:54:10:15**  
21 of foundation.

22 MR. CACACE: Objection to form.

23 A. No.

24 BY MR. STENERSON:

25 Q. Did Mr. Danks ever tell you that under the **13:54:14:25**

1 Government's theory of the case, they believe that the **13:54:16:21**  
2 hospital should receive lower reimbursements from Blue  
3 Cross?

4 MR. LIPTON: Objection to form. Lack  
5 of foundation. **13:54:24:09**

6 A. No.

7 BY MR. STENERSON:

8 Q. Did Mr. Danks ever tell you that under the  
9 Department of Justice's theory, that they believe that  
10 the hospital should be -- should receive lower **13:54:30:00**  
11 reimbursement payments from all commercial payers?

12 MR. LIPTON: Objection to form. Lack  
13 of foundation.

14 A. No, he didn't say that.

15 BY MR. STENERSON: **13:54:38:09**

16 Q. What's your opinion as to the current Blue  
17 Cross reimbursement rate?

18 A. You know, I wish it were higher. It has  
19 been higher in the past. It seems like it goes down  
20 every year. They just keep lowering it and lowering **13:54:55:16**  
21 it.

22 Q. Do you have an understanding of why Blue  
23 Cross is trying to lower its reimbursement rates?

24 MR. LIPTON: Objection to form.

25 A. Nope. I just know that since I've been CFO **13:55:05:09**



These documents are specifically relevant to rebutting the antitrust markets alleged by the Department of Justice and State of Michigan in their Complaint. It is beyond dispute that information directly relating to the claims, allegations, and defenses in an action is relevant and discoverable under Fed. R. Civ. P. 26(b)(1). The fact that such information is sought from a non-party does not change this.

Further, St. Catherine fails to substantiate its undue burden excuse. Not only has Blue Cross narrowed the scope of the information requested, Blue Cross has also offered to send its own attorney to search for and copy non-privileged documents responsive to the subpoena **at no cost to the Hospital**. Alternatively, Blue Cross proposed the following measures to reduce the burden of locating responsive documents:

- (1) limiting the hospital's search to key custodians most likely to have, and specific files known to contain, responsive documents;
- (2) excluding electronically stored information that has been archived and documents stored off-site from the search; and
- (3) utilizing key word searches on active emails.

St. Catherine's estimation of the time and cost to respond to the subpoena seemingly fails to account for any of these proposed accommodations. Indeed, St. Catherine fails to demonstrate any undue burden that would result from producing what Blue Cross is actually requesting.

Finally, the existing Protective Order entered in the underlying action vitiates St. Catherine's objection based on the alleged proprietary nature of the requested information. Any information produced pursuant to the subpoena that is properly designated as either "confidential" or "attorneys eyes only" will be treated as such pursuant to court order. St. Catherine fails to demonstrate any reason why this protection is insufficient.

Accordingly, because the information Blue Cross requests is directly relevant to the underlying action and St. Catherine has not demonstrated, and cannot demonstrate, any excuse for its non-production, Blue Cross's motion to compel should be granted.

## II. ARGUMENT

### A. **The Requested Information is Relevant to the Claims and Defenses Asserted in the Underlying Lawsuit.**

The discovery Blue Cross requests from St. Catherine is directly relevant to rebutting the antitrust markets alleged by the plaintiffs as to St. Joseph County (Michigan), the Kalamazoo, Michigan area, and elsewhere within Southwestern Michigan. *See*, Complaint at ¶ 28 (attached to Memorandum in Support at Ex. 2). Blue Cross asserts that the plaintiffs fail to accurately define these markets. The information sought from St. Catherine regarding (1) where people that live and work within these areas can and do go for health care (i.e., the relevant geographic market) and (2) the healthcare insurance options available to those that live and work in these areas (i.e., the relevant product market), is directly relevant to Blue Cross's attack and should be produced.

It should be no surprise that individuals that live and work in counties adjacent to or near the Indiana-Michigan border<sup>1</sup> (such as St. Joseph County) seek healthcare in both Indiana and Michigan. Thus, information regarding healthcare provided throughout the Michiana and greater Michiana area is relevant to Blue Cross's defense.<sup>2</sup> Logically, this includes the information requested from St. Catherine.

---

<sup>1</sup> Also referred to as the "Michiana" or "Southern Lakeshore" region.

<sup>2</sup> St. Catherine's argument that Blue Cross issued the subpoena only to establish a "baseline" or "control group" is incorrect and taken out of context. Regardless of prior conversations, as discussed above, the requested information is directly relevant to the market analysis in the underlying matter. To the extent counsel for Blue Cross may have used the terms "baseline" or "control group" with respect to the relevance of the requested information, such references were made merely in the context of needing

**1. The requested information is directly relevant to determining where Southwestern Michigan residents can seek care.**

Located less than fifty miles from the Michigan border, St. Catherine logically is a facility from which those that live and work in St. Joseph County (Michigan) and throughout the greater Michiana area can seek care. The information Blue Cross requests regarding from where St. Catherine draws its patients, such as its primary and secondary markets, is directly relevant to determining (1) the validity of the plaintiffs' alleged St. Joseph County market and (2) the appropriate geographic market for Southwestern Michigan.

St. Catherine provides no evidence or argument to the contrary in its response. St. Catherine summarily concludes that it “does not compete for patients or payors *with Blue Cross*,” without any argument or evidence that it does not provide services *to Michigan residents* or that it is a facility *to which Michigan residents can practicably go* – a relevant focus in analyzing geographic markets. *FTC v. Tenent Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999); *Republic Tobacco Co. v. N. Atl. Trading Co., Inc.*, 381 F.3d 717, 738 (7th Cir. 2004).

Neither the fact that St. Catherine is located in Indiana and not in Michigan, nor the fact that it is not a so-called destination-hospital, affects the relevance of the requested information to a proper geographic market analysis in the underlying matter. The Government itself acknowledges that Michigan residents “travel across state lines” to receive health care. *See* Compl. ¶ 11 (attached to Memorandum in Support at Ex. 2). Given its location less than fifty miles from the Michigan border, St. Catherine is plainly a viable geographic alternative for Southwest Michigan residents and, therefore, the information requested by Blue Cross is directly relevant to establishing a relevant geographic market.

---

information from hospitals that do not directly contract with Blue Cross in order to rebut the markets alleged by plaintiffs.

**2. The requested information is directly relevant to determining commercial health care alternatives available to Southwest Michigan residents.**

Similarly, the information requested by Blue Cross is directly relevant to determining the commercial health care alternatives, i.e., the relevant product market, available to those in the St. Joseph market, as well as potentially the Kalamazoo and other Southwestern Michigan markets. The plaintiffs allege that Blue Cross's purported conduct has caused hospital costs and other insurance providers' premiums to increase, resulting in reduced competition among healthcare insurers in St. Joseph County and elsewhere in Southwestern Michigan. As discussed above, St. Catherine is a facility at which those in the Michiana and greater Michiana area may practicably seek healthcare. Accordingly, information regarding the Hospital's costs, and specifically, whether the costs have increased, decreased, or remained the same, and why; its various healthcare payors (the Hospital's "payor mix"); and the payors' rates is relevant to the plaintiffs' allegations.

The fact that St. Catherine itself does not compete with Blue Cross misses the point. The relevant point is that *the commercial payors* with which St. Catherine contracts compete with Blue Cross, and therefore, economic information related St. Catherine's commercial payor contracts is relevant to a product market analysis in this antitrust case. Although St. Catherine contends that, for the most part, it does not maintain commercial contracts, it concedes that commercial payors constitute at least 23.1% of its payor mix. This is not an insubstantial proportion and certainly is, at a minimum, sufficient to justify Blue Cross's requested discovery under the Federal Rules.

As explained above, the narrowly-tailored information requested by Blue Cross is directly relevant to both geographic and product markets at issue in this matter. Because St. Catherine has not demonstrated, and cannot demonstrate, that the burden associated with

compiling the requested information outweighs its relevance, Blue Cross's motion to compel should be granted.

**B. Blue Cross Has Already Offered to Mitigate the Cost and Purported Burden of Complying With The Subpoena.**

St. Catherine also fails to demonstrate that responding to the subpoena would be unduly burdensome, particularly given Blue Cross's repeated offers to minimize any such burden.

From the outset, Blue Cross offered St. Catherine the opportunity to: (1) limit its searches to key custodians most likely to have relevant documents and specific responsive files known to the hospital in the possession of non-key custodians; (2) limit its search to files known to contain responsive documents and not require a search for "all documents"; (3) exclude electronically stored information that is archived<sup>3</sup> and documents stored off-site from its searches; and (4) utilize key word searches on active emails. Moreover, Blue Cross offered to send its own attorney to the hospital's location to search files and copy responsive, non-privileged documents at its own expense, completely mitigating the cost-related burden now asserted by St. Catherine.

Notwithstanding these proposed limitations, St. Catherine refused to comply with the subpoena. Blue Cross then proposed additional limitations to the substantive scope of the subpoena, requesting St. Catherine produce four specific categories of documents. *See*, Memorandum in Support, Ex. 6. These additional limitations further reduced both the volume of documents to be searched and produced, as well as the resources required to do so. Again, St. Catherine refused to comply with the subpoena.

---

<sup>3</sup> St. Catherine incorrectly asserts that "Blue Cross's counsel has stated that it would not require electronic information from St. Catherine's." Response in Opposition at p. 6, n. 16. To the contrary, the subpoena plainly defines the term "Document" as used therein to include electronically stored information. *See*, Brief in Support at Ex. 3. Moreover, Blue Cross's counsel's correspondence memorializing its various proposals to reduce the hospital's burden in responding to the subpoena specifically references the search and production of active email, and thus plainly contemplated the production of electronic information. *See*, Memorandum in Support at Ex. 6.

St. Catherine makes no reference to the proposed limitations in its Response Brief or either affidavit attached thereto. And its estimated cost of a single employee searching for and compiling its response to the subpoena seemingly fails to account for these proposed limitations and accommodations. Moreover, St. Catherine fails to explain how or why a search of active and on-site files known to contain responsive documents by key custodians would be performed by a single employee or take three weeks to complete.

Further, no basis exists to shift St. Catherine's costs of responding to the subpoena to Blue Cross beyond the extent Blue Cross has already proposed. Again, Blue Cross has offered to send its own attorney to the Hospital to gather and copy non-privileged responsive documents at no cost to St. Catherine. Alternatively, Blue Cross's limitations to the scope of the subpoena have minimized the efforts and resources necessary to locate responsive documents and the volume of documents to be produced. Blue Cross will pay reasonable copy costs for whatever documents are produced. The resulting cost to St. Catherine is minimal, especially compared to the probative value of the information sought.

**C. The Existing Protective Order Vitiates St. Catherine's Objection that the Requested Information is Proprietary.**

St. Catherine's continued objection to the subpoena on the grounds it seeks proprietary information is without merit. A Protective Order expressly protecting the various non-party hospital's confidential and proprietary information, and limiting the release of any sensitive material, was entered in the underlying action. Accordingly, any information properly designated as confidential or "Attorneys Eyes Only" will be treated as such. St. Catherine provides no basis for its superficial challenge that the protection afforded by the existing Protective Order is insufficient.

Similarly, the fact that St. Catherine operates as part of the Community Healthcare System does not excuse St. Catherine from compliance with the subpoena. Again, any documents properly marked as confidential or otherwise will be protected as such under the Protective Order, eliminating any risk of inappropriate disclosure to the Community Healthcare System. Moreover, St. Catherine exists as a legally cognizable corporation and was properly served with a subpoena under Fed. R. Civ. P. 45. St. Catherine cannot avoid its obligations to respond to the subpoena through a practice of muddling its corporate information with that of others and then claiming burden based on the manner in which it maintains its own documents.

### **III. CONCLUSION**

For the reasons stated above, as well as those stated in its principal Brief in Support, Blue Cross respectfully requests that this Court grant its Motion to Compel St. Catherine to produce documents responsive to its Rule 45 subpoena issued on October 7, 2011.

Respectfully submitted,

/s/Jennifer M. Johnson

Jennifer M. Johnson  
ICE MILLER LLP  
One American Square  
Suite 2900  
Indianapolis, IN 46282-0200  
(317) 236-2100

Douglas A. Henning  
ICE MILLER LLP  
200 W. Madison Street  
Suite 3500  
Chicago, IL 60606-3417

Joseph A. Fink (MI Bar No. P13428)  
Michelle L. Alamo (MI Bar No. P60684)  
Patrick B. Green (MI Bar No. P68759)  
DICKINSON WRIGHT PLLC  
500 Woodward Avenue, Suite 4000  
Detroit, MI 48226  
(313) 223-3148

Todd M. Stenerson (MI Bar No. P51953)  
D. Bruce Hoffman (DC Bar No. 495385)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037  
(202) 955-1500

*Counsel for Defendant Blue Cross Blue Shield  
of Michigan*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Timothy J. Abeska  
Alice J. Springer  
BARNES & THORNBURG LLP  
600 1st Source Bank Center  
100 North Michigan Street  
South Bend, Indiana 46601-1632  
[tim.abeska@btlaw.com](mailto:tim.abeska@btlaw.com)  
[alice.springer@btlaw.com](mailto:alice.springer@btlaw.com)

and that I served the following non CM/ECF participants by depositing a copy of the foregoing in the United States Mail:

Ryan Danks  
U. S. Department of Justice  
WAS/DC/450  
450 Fifth Street NW Suite 4100  
Washington, DC 20530

M. Elizabeth Lippitt  
525 W. Ottawa Street  
Lansing, MI 48933

s/Jennifer M. Johnson  
Jennifer M. Johnson  
ICE MILLER LLP  
One American Square  
Suite 2900  
Indianapolis, IN 46282-0200