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

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

PLAINTIFFS UNITED STATES OF AMERICA'S AND STATE OF MICHIGAN'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S "OMNIBUS" MOTION FOR A 90-DAY STAY OF DEPOSITIONS

Peter Caplan (P-30643)
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
Peter.caplan@usdoj.gov

Barry J. Joyce
Ryan Danks
Amy R. Fitzpatrick
David Gringer
Michael T. Koenig
Steven B. Kramer
Richard Liebeskind
Litigation I Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W.
Washington, D.C. 20530

Attorneys for the United States

M. Elizabeth Lippitt (P-70373)
Thomas S. Marks (P-69868)
Assistant Attorneys General
G. Mennen Williams Bldg., 6th Floor
525 W. Ottawa Street
Lansing, Michigan 48933

Attorneys for the State of Michigan

TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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

STATEMENT OF ISSUES

1. Should this Court grant Blue Cross's motion to stay depositions when Blue Cross has not demonstrated good cause why it cannot negotiate the purported issues justifying its stay motion while deposition discovery proceeds, and has failed to meet and confer on those issues before filing its motion?

2. Should this Court amend the scheduling order when Blue Cross has not demonstrated good cause to do so and substantial prejudice to the public's interest in the prompt adjudication of this law-enforcement action would result?

I. INTRODUCTION

Blue Cross's motion to stay depositions is yet another attempt by Blue Cross to delay this law-enforcement action. This Court should deny the motion because Blue Cross has failed to show the requisite good cause, and because Blue Cross's motion would require this Court to modify its scheduling order and extend fact discovery beyond July 25, 2012.

Blue Cross's motion is premature. Before filing its motion, Blue Cross made no attempt to use standard meet-and-confer procedures to resolve the underlying issues that purport to justify a stay, which are thus not properly before this Court. And in any case, the issues underlying Blue Cross's stay motion can be addressed (and resolutions negotiated) while depositions proceed.

Far from showing the good cause necessary for a stay, Blue Cross's purported justifications are based on speculation or are issues largely of its own creation:

- Blue Cross complains that the confidentiality protective orders in the various cases are inconsistent, but it was Blue Cross that demanded a protective order in the *Aetna* case that differs significantly from the existing orders in this enforcement action and the private class actions.

- Blue Cross complains about potential duplication of depositions of non-party witnesses, even though no private plaintiff has sought a second deposition of a witness deposed in this case.
- Blue Cross complains about the need to coordinate the written discovery for email served on it, even though it has unreasonably delayed its email searches for many months and has already confirmed that it is conducting email searches.
- Blue Cross complains about the lack of a common case-management order, but no such order is necessary when almost all discovery problems have resulted from Blue Cross's own unreasonable dilatory tactics, not those of the government or private plaintiffs, and Blue Cross had not, before making this stay motion, proposed a common case-management order.

Since the start of discovery, the United States and the State of Michigan have worked with the private plaintiffs[1] to coordinate discovery informally, such as sharing deposition time, where feasible, thus minimizing duplication and inefficiency without delaying or interfering with this action.

[1] Unless otherwise specified, "class plaintiffs" refers to plaintiffs in the *Shane Group*, *Steele*, and *Michigan Regional Council* cases and "private plaintiffs" refers to those plaintiffs and Aetna. Plaintiff City of Pontiac (in *City of Pontiac v. Blue Cross*, No. 11-cv-10276) agreed to a stay of discovery with Blue Cross. Doc. 123 at 2 n.3. Accordingly, City of Pontiac has not participated in depositions or other discovery, nor have government plaintiffs attempted to coordinate discovery with that case, which alleges a different theory of liability involving unique facts.

Continuing informal discovery coordination will further promote efficiency while enabling this case to proceed promptly, as Congress intended. 15 U.S.C. § 4. To help ensure the remaining five months of discovery proceed efficiently, the government plaintiffs will move for entry of a case-management order in this case that will, among other things, include provisions embodying the informal coordination of discovery that has worked well to date. By contrast, Blue Cross's professed desire to have one case-management order formally coordinating discovery across all related actions would inappropriately delay and interfere with this enforcement action.

For these reasons, the United States and the State of Michigan oppose Blue Cross's request for a stay.[2]

II. BACKGROUND

This stay motion is yet another example of Blue Cross's attempts to delay discovery in this law-enforcement action. Blue Cross argues issues that are not properly before this Court, and it disregards the good-faith efforts at informal coordination and resolution of other issues that plaintiffs have made.

[2] Alternatively, Blue Cross seeks a stay of all discovery in the private actions "pending resolution of the DOJ action." Doc. 123 at ii. Government plaintiffs also oppose this request, which would simply increase duplication and inefficiency.

A. Blue Cross has previously attempted to delay discovery

Blue Cross has attempted to delay discovery in this action since nearly the beginning of the case, despite its agreement to a July 25, 2012, completion date for fact discovery. Doc. 67. First, it moved to stay discovery pending resolution of its motion to dismiss. Doc. 20. Then it refused to produce documents in response to plaintiffs' first request for documents while that motion to dismiss was pending, forcing the government plaintiffs to file a motion to compel, which this Court granted. Doc. 66. Despite this Court's observation that the parties should "get moving" on discovery,[3] Blue Cross did not complete its production in response to plaintiffs' first document request—served February 4, 2011—until January 2012. Blue Cross has still not completed its production in response to plaintiffs' second document request—served August 2, 2011—or even agreed to a schedule for doing so. Doc. 111 & 131. Now through this motion Blue Cross seeks to push back depositions even later.

B. Plaintiffs have informally coordinated successfully

The United States has coordinated discovery successfully with private plaintiffs. At Blue Cross's suggestion in August 2011, the United States and State of Michigan included in a draft case-management order a provision that has since provided the framework for plaintiffs' informal coordination of depositions in this case. The provision allows private plaintiffs to participate

[3] *City of Pontiac v. Blue Cross Blue Shield et al.*, 11-10276, Record at 13 (June 7, 2011).

in depositions, time permitting, and with the consent of the deponent. *See* Exhibit 1. As a result, class plaintiffs have participated in all depositions taken in this case—including three depositions on February 27, 2012, the day Blue Cross filed its motion claiming informal coordination was not working, and several more since then.[4]

More generally, government plaintiffs have been coordinating successfully with private plaintiffs whenever that coordination does not interfere with or delay this action. In addition to sharing time in depositions, government plaintiffs have informally sought input from private plaintiffs on document requests, Rule 45 subpoenas, and deposition questions. This coordination among plaintiffs has worked well, despite Blue Cross's intransigence on issues like deposition attendance and document production to private plaintiffs. It has achieved its objective of minimizing inefficiency while allowing this case to proceed promptly, as Congress intended for antitrust enforcement actions brought by the United States to enjoin anticompetitive conduct.[5]

Moreover, informal coordination has worked on occasion even among the plaintiffs and Blue Cross. On March 13, two weeks after filing its stay

---

[4] *See* Doc. 55 at 3 in 2:10-cv-14360-DPH-MKM (filed Mar. 7. 2012) (describing class plaintiffs' participation in depositions to date).

[5] Indeed, on February 7, 2012, Blue Cross agreed that plaintiffs' draft proposed case-management order "accurately stated the parties' practice to date," Exhibit 2 at 2, and on February 17 Blue Cross reaffirmed that "to date, the parties have cooperated" in this manner in depositions. Exhibit 3 at 3.

motion, Blue Cross held a preliminary teleconference to discuss the purported justifications underlying its motion to stay. On that teleconference, the parties in all cases successfully addressed some of the issues Blue Cross had raised, including common service of discovery requests and confidentiality concerns related to individuals' protected health information. The conference itself—which should have been held before Blue Cross filed its stay motion—and its outcome demonstrate that a stay is unnecessary to discuss the issues it raises.

C. Blue Cross has failed to meet and confer on the stay motion or its purported justifications underlying its stay motion

The issues underlying Blue Cross's stay motion are not properly before this Court. Blue Cross filed its motion to stay depositions without attempting to resolve the purported issues that it cites to justify a stay. In fact, notice of Blue Cross's stay motion came as a surprise to plaintiffs. Exhibit 4 at 1. On Friday afternoon, February 24, Blue Cross convened a teleconference with all plaintiffs, ostensibly to discuss informal coordination at an upcoming deposition. At the end of that call, Blue Cross announced that it sought all plaintiffs' concurrence in a motion that it would file that day, seeking a 90-day stay of depositions in this action purportedly to "allow private plaintiffs to catch up on document discovery," Exhibit 5, or, alternatively, a stay of the

private actions.[6] Blue Cross also listed issues that it would seek to discuss with plaintiffs during the 90-day stay, but stated it was not then seeking to meet and confer about those underlying issues. *Id.*

Moreover, although Blue Cross first raised its desire for formal coordination of discovery across all actions in January 2011, Blue Cross did not, despite plaintiffs' repeated requests, make a specific proposal. Exhibit 6; Exhibit 7. Blue Cross has still not provided plaintiffs with a specific proposal for a common case-management order, although government plaintiffs continue to believe, as described previously, that discovery in this enforcement action can be coordinated informally with discovery in the private cases, provided that doing so does not delay or interfere with the prosecution of this action.[7]

III. ARGUMENT

Blue Cross has failed to establish good cause for a 90-day stay of depositions. Moreover, Blue Cross does not acknowledge that the stay it requests is properly viewed as a motion to modify this Court's scheduling order, and has failed to demonstrate good cause for such a modification,

[6] (Blue Cross offers help that the private plaintiffs do not need; although Blue Cross claims that the private plaintiffs can use the 90-day stay to "catch up", the private plaintiffs, too, oppose this stay.)

[7] *See* Doc. 19 at 5-6 (plaintiffs' statement of discovery); Exhibits 6 & 7.

particularly in light of the prejudice to the public interest in avoiding further delays of the prompt adjudication of this antitrust enforcement action.

A. Blue Cross has failed to show good cause for a stay of deposition discovery while Blue Cross discusses coordination issues with plaintiffs

Blue Cross must show good cause to obtain a protective order. Fed. R. Civ. P. 26(c). "To show good cause, a movant for a protective order must articulate specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements." *Nix v. Sword*, 11 Fed. App'x 498, 500 (6th Cir. 2001); *see also Chauvin v. State Farm Mut. Auto. Ins. Co.,* 2011 WL 1810625 at *3 (E.D. Mich. May 11, 2011) (declining to enter protective order because defendant's "general allegation" about what "may result" in the absence of an order was too "speculative") (Majzoub, M.J.).

None of the reasons Blue Cross cites in support of its stay motion demonstrate the required good cause. To the contrary, Blue Cross's purported justifications for a stay are largely speculative or arise from conflicts it created and its own failures to resolve discovery issues reasonably. Blue Cross fails to explain why the issues it raised cannot be negotiated and resolved while depositions proceed, as has already happened. Thus, Blue Cross's motion falls far short in establishing any "clearly defined and serious injury."

1. Blue Cross created conflicting, rather than coordinated, confidentiality protective orders across related cases

The Court entered a stipulated confidentiality protective order for this case on March 16, 2011. Doc. 36. Aside from a minor issue regarding protected health information, which the parties resolved while depositions continued, this protective order has functioned well, allowing nonparties and Blue Cross to produce confidential commercial information without concern about improper disclosure. This Court entered similar orders in the private class actions.[8]

Despite the success of these earlier confidentiality orders, and even though Aetna was willing to agree to a similar order, Blue Cross insisted that Aetna agree to an order that varied significantly from the orders in this case and the private class actions. Exhibit 8. Blue Cross leveraged Aetna's willingness to work quickly to catch up with other plaintiffs to obtain this new and materially different protective order. *Id.* Those differences include, among others, requiring producing non-parties to employ two levels of confidentiality designations, with one level allowing disclosure of information to in-house counsel. The protective orders in this case and the class actions do not allow such disclosures.

Blue Cross now insists that the substantially different *Aetna* order serve as a model for a coordinated protective order, ignoring the significant

[8] *E.g.*, Doc. 47 in *The Shane Group et al. v. Blue Cross Blue Shield of Michigan* 2:10-cv-14360-DPH-MKM (entered Oct. 5, 2011).

complications for nonparties that have already produced or are in the process of producing documents under subpoena in this case in reliance on the greater protections in this case's protective order.[9] Aetna recognizes the inefficiency of the protective order in its case, and remains willing to adhere to the protective order entered in the government case. Exhibit 8.

2. Blue Cross has unreasonably delayed production of its emails.

Ironically, Blue Cross claims in its stay motion that a schedule for its email production is an appropriate topic of discussion during a stay. Doc. 123 at 15. This argument is without merit: Blue Cross has refused—more than seven months after receiving Government plaintiffs Second Request for Documents—to agree to a schedule to produce responsive email, and that delay is now subject to a motion to compel. Doc. 111. Moreover, Blue Cross has acknowledged that successive email searches can be done as a part of staged discovery. Doc. 131, Ex. 1. Having created this issue, Blue Cross cannot now use it to demonstrate good cause to further delay this action.

---

[9] Blue Cross itself has already demonstrated the inefficiencies of the two-tier confidentiality designations that it insisted be incorporated in the *Aetna* protective order. *See* Exhibit 9 (March 5, 2012 Blue Cross document-production letter to the United States, notifying Aetna that Blue Cross is not then "producing the documents to Aetna, as they have not yet been designated for confidentiality under the two tier structure of the protective order in the Aetna case"). Blue Cross proceeds to note "[t]he confusion caused by the different treatment of the same documents under different protective orders," but Blue Cross's omnibus motion ignores that the confusion was created by Blue Cross's insistence on a different protective order in the Aetna case. *E.g.,* Exhibit 10.

Without Blue Cross's agreement to a timeline for email production, it is difficult for plaintiffs to schedule many of the needed depositions of Blue Cross employees. As a result, party depositions are likely to occur on an accelerated pace near the end of fact discovery on July 25. Government plaintiffs are trying to conduct non-party discovery before then so that they will have sufficient time and resources to complete party depositions by the end of fact discovery.

3. Blue Cross's concerns about duplicative discovery are speculative

Blue Cross claims that a 90-day stay is necessary to protect non-parties from duplicative discovery.[10] This is a wholly speculative concern. The informal coordination that has taken place to date has *avoided* duplicative discovery for nonparties. Nonparty depositions have been taking place with private class plaintiffs participating, likely obviating the need for taking the same deposition again. And non-parties can of course seek judicial relief if they are unjustifiably burdened with multiple depositions. Further, informal coordination by private plaintiffs regarding document discovery has obviated the need to date for nonparties to perform multiple document searches or otherwise face redundant document demands.

[10] In light of this professed concern, it is also ironic that Blue Cross has attempted to limit private plaintiffs' participation in depositions noticed in this case, which would only increase the chances that multiple depositions would be necessary. Exhibit 2 at 2 (addressing private class plaintiffs' participation); Exhibit 8 (addressing Aetna's participation).

B. Blue Cross has failed to demonstrate good cause for modification of this case's scheduling order

Blue Cross also fails to acknowledge that its motion to stay deposition discovery is a motion to modify the scheduling order, but the Court should treat it as such. "'A [scheduling order] shall not be modified except upon a showing of good cause.'" *Andretti v. Borla Performance Industries, Inc.*, 426 F.3d 824, 830 (6th Cir. 2005) (quoting Fed. R. Civ. P. 16(b)) (determining that the "district court correctly analyzed" a motion to strike dispositive motion filed after deadline "as a request to modify the scheduling order"). In assessing good cause for modification of a scheduling order, the Sixth Circuit has instructed that "'[t]he primary measure of Rule 16's "good cause" standard is the moving party's diligence in attempting to meet the [scheduling] order's requirements.'" *Id.* (*quoting Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002)); *see also Soto v. First American Title Ins. Co.*, 2008 WL 3049982 at *2 (E.D. Mich. Aug. 1, 2008) (Hood, J.).

Blue Cross has framed its request for the three-month deposition stay as necessary to "allow the private plaintiffs to catch up," while ignoring the impact of its requested stay on the stipulated schedule in this case. In fact, the stay would necessarily extend this Court's scheduling order, which provides that fact discovery will close in less than five months, on July 25, 2012. Extending fact discovery by 90 days would necessitate also postponing the scheduled April 2, 2013 trial. Doc. 67.

Blue Cross cannot demonstrate good cause for modifying this Court's scheduling order because (1) it has made no serious attempt to address the issues it raises now in a timely manner that respects the scheduling order, and (2) modifying the order would cause serious harm to the public interest from the delay to this enforcement action.

1. Blue Cross has made no showing of diligence warranting a modification of the scheduling order

Despite seeking a *de facto* change to this case's scheduling order, Blue Cross makes no attempt to show the diligence required to obtain an extension to the schedule. Other than suggest that government plaintiffs share deposition time with private plaintiffs, which the government plaintiffs have done, Blue Cross failed to make any proposal for coordination before filing this motion. Nor did Blue Cross provide any plaintiffs with a proposed confidentiality protective order to govern all cases until after its motion for a stay was filed. The Court should not permit Blue Cross to transform its failure to make actual proposals on the protective order or other coordination issues for more than a year (Exhibits 6-7) into the requisite good cause that would justify its request to stay depositions and necessitate modification of the scheduling order.

2. Further delay would prejudice the public's interest in stopping Blue Cross's anticompetitive conduct

Before modifying a scheduling order, courts "should also consider possible prejudice to the party opposing the modification." *Andretti*, 426 F.3d

at 830; *Inge*, 281 F.3d at 625. In addition, a court's evaluation of a motion for a protective order must be "informed by and incorporate[]" the "many interests that may be present in a particular case," including relevant statutes. *United States v. Microsoft Corp.*, 165 F.3d 952, 959-60 (D.C. Cir. 2001). In this case, the United States seeks "injunctive remedies on behalf of the general public." *United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Delaying discovery in this government plaintiffs' law-enforcement action is at odds with Congressional intent that such actions be adjudicated expeditiously.

Here, Rule 26(c) should be read in light of Congress's clearly expressed intent that antitrust enforcement actions brought by the United States should proceed expeditiously. Section 4 of the Sherman Act, 15 U.S.C. § 4, the jurisdictional statute under which the United States has brought its claim, provides that government antitrust enforcement actions "shall proceed, *as soon as may be*, to the hearing and determination of the case."[11] Delaying

---

[11] 15 U.S.C. § 4 (emphasis added). The full text of § 4 reads:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition *the court shall proceed, as soon as may be, to the hearing and determination of the case*; and pending such

depositions for three months in this case to accommodate Blue Cross's purported issues would turn this statutory directive on its head.

As the government plaintiffs have previously noted, *see* Docs. 27 & 53, the multi-district litigation statute, 28 U.S.C. § 1407, also suggests Blue Cross's request for delay of this enforcement action should be denied. In 28 U.S.C. § 1407(g), Congress exempted government antitrust injunctive actions from being "coordinated or consolidated [in] pretrial proceedings," 28 U.S.C. § 1407(a), with private damages cases. "Congress has made the decision that inefficiencies and inconvenience to antitrust defendants are trumped by an unwillingness to countenance delay in the prosecution of Government antitrust litigation." *United States v. Dentsply*, 190 F.R.D. 140, 146 (D. Del. 1999).

The policy underlying the multi-district exemption of federal antitrust enforcement actions also applies to delays that would result from coordination of this action with related cases pending before the same court, as in *Dentsply*, which itself is directly on point. *Id.* at 144.[12] "[I]n weighing

---

> petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Id. (emphasis added).

[12] *Dentsply* "involved a motion to consolidate [discovery in] a government antitrust case with two private "tag-along" suits, all three of which were already pending before the same district court." *F.T.C. v. Cephalon, Inc.*, 551 F.Supp.2d 21, 33 n.7 (D.D.C. 2008)(citing *Dentsply*, 190 F.R.D. at 141).

the public interest in expedited resolution of government antitrust enforcement actions against the potential burdens of duplicative discovery on defendants . . . [Congress] chose to strike the balance in favor of the public's interest in expedited relief." *Dentsply,* 190 F.R.D. at 144 (D. Del. 1999). Expediting federal actions "without being burdened by delays that consolidation [or coordination] may cause . . . also makes a judgment in favor of the Government available for use in a private suit[, which] promotes judicial efficiency by fostering settlement." *Dentsply*, 190 F.R.D. at 145 (citing 15 U.S.C. § 16(a)).

Congress recognized "the primacy of antitrust enforcement actions brought by the United States, [because] they seek to enjoin ongoing anticompetitive conduct," while "private parties are primarily interested in recovering damages for injuries already suffered." *Id.* at 145. The need for expeditious resolution of this antitrust suit brought by the United States and the State of Michigan is concrete. As the Complaint alleges, Blue Cross's anticompetitive conduct has adversely "affected and will continue to [adversely] affect purchasers of both group and individual commercial health insurance." Complaint ¶ 24. While these anticompetitive practices continue, the public will continue to suffer from decreased competition in the vital health insurance markets, which leads to higher prices and lower quality for Michigan consumers. Consequently, the government plaintiffs oppose the

delay Blue Cross's stay motion would create and seek to end this harm "as soon as may be." 15 U.S.C. § 4.

In short, Blue Cross's motion for a 90-day stay of depositions in this action has failed to establish good cause to ignore Congress's statutory directives. Indeed, its motion embodies precisely the type of delay— "to allow the private plaintiffs to catch up"—that Section 4 of the Sherman Act and the multi-district litigation statute seek to avoid. *See Dentsply*, *supra*.

IV. CONCLUSION

The Court should deny Blue Cross's stay motion. The better approach is to let discovery proceed without interruption in this case, coordinated informally with the private plaintiffs.

Respectfully submitted,

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

s/ Ryan Danks
Antitrust Division
U.S. Department of Justice
450 Fifth Street, N.W.
Washington, D.C. 20530
(202) 305-0128
ryan.danks@usdoj.gov
Attorney for the United States

Dated: March 15, 2012

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that on the date displayed above he served a copy of the foregoing in accordance with this Court's policies and procedures for service of electronically filed documents.

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

Exhibit 1

From: Cummings, Ashley [acummings@hunton.com]
Sent: Thursday, August 18, 2011 10:48 AM
To: Fitzpatrick, Amy
Cc: Lasken, Jonathan H.
Subject: US v. Blue Cross - Draft CMO
Attachments: ORD_ Case Management Order_(36821961)_(1).DOCX

Amy,

Here is a redline CMO with our comments and suggestions. Please let us know if you'd prefer this in a different format.

Best,
Ashley

Home VCard Bio

HUNTON& WILLIAMS

Ashley Cummings
Partner
acummings@hunton.com

Hunton & Williams LLP
Bank of America Plaza, St 4100
600 Peachtree Street, N.E.
Atlanta, GA 30308
Phone: (404) 888-4223
Fax: (404) 602-9019
www.hunton.com

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, vs. BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No. 10-cv-14155-DPH-MKM Judge Denise Page Hood Magistrate Judge Mona K. Majzoub

[DRAFT] CASE MANAGEMENT ORDER

Upon joint motion of the parties, and in accordance with Fed. R. Civ. P. 16(b), the Court hereby ORDERS as follows:

1. Depositions of Fact Witnesses.

a. Notice and Scheduling. Unless the parties agree otherwise concerning a particular deposition, ~~fourteen~~ 30 days shall constitute reasonable notice to the other side under Fed. R. Civ. P. 30(b)(1) of a party deposition and 20 days shall constitute reasonable notice to the other side under Fed. R. Civ. P. 30(b)(1) of a non-party deposition. Depositions may be taken or defended by telephone or other remote means.

b. Number of Depositions~~Time Limits~~. ~~Examination of witnesses in non-expert depositions in this action shall be limited to 500 hours for the government plaintiffs and 500 hours for defendant. Only deposition time during which one side controls the questioning shall count against that side's hour limitation.~~Plaintiffs may take 170 depositions, including depositions of parties, third parties, and witnesses designated

as corporate representatives under Fed. R. Civ. P. 30(b)(6). Defendants may take 170 depositions, including depositions of parties, third parties, and witnesses designated as corporate representatives under Fed. R. Civ. P. 30(b)(6).

c. Duration of Depositions. Absent a Court order extending the time or agreement of counsel, depositions shall be limited to one day of seven hours, during which the noticing party shall have five hours and the other party shall have 2 hours, except in the event that private plaintiffs in parallel litigation before this Court also participate in the deposition, in which instance the parties agree that those private plaintiffs shall have one additional hour to question the deponent and thus the duration of the deposition will total eight hours. Upon request, counsel for the witness shall be allocated up to 30 minutes of examination time, which shall not count against the duration allotted above. To the extent the non-noticing party believes it needs additional time to question a third-party witness, that party must cross-notice the deposition, in which instance the cross-notice will count against the cross-noticing party's deposition quota as well as the noticing party's deposition quota.

Formatted: Underline

d. Cancellation of Non-party Depositions: A party may elect to cancel a non-party deposition that it previously noticed. If a party cancels a non-party deposition that it previously noticed, the opposing party may re-notice the deposition for the previously noticed date, unless the deposition was cancelled due to extraordinary and unforeseen circumstances, in which event the parties will meet and confer regarding an agreeable date for the deposition.

2. Expert Depositions. Expert depositions may extend to two days of up to seven hours each day for each expert witness; and, in the event that private plaintiffs in parallel

litigation before this Court also participate in the expert deposition, those private plaintiffs shall have two additional hours to question the deponent.. Unless the parties agree otherwise concerning a particular deposition, ~~fourteen~~ 5 days shall constitute reasonable notice to the other side under Fed. R. Civ. P. 30(b)(1) of a deposition.

~~2.~~3. Interrogatories. Pursuant to Fed. R. Civ. P. 33(a)(1), interrogatories shall be limited to 25 per side, including sub-parts. The parties agree that each numbered interrogatory set forth in Blue Cross Blue Shield of Michigan's First Interrogatories to Plaintiff the United States of America constitutes a single interrogatory and any subparts therein shall not be counted as multiple interrogatories because they are factually or logically related to the primary question; and the parties further agree that if Plaintiffs serve the same or substantially similar interrogatories on Blue Cross, each numbered interrogatory shall constitute a single interrogatory and any subparts therein shall not be counted as multiple interrogatories, except that Blue Cross reserves the right to object on the grounds that an interrogatory with subparts should be counted as multiple interrogatories rather than one interrogatory if any interrogatory that Plaintiffs serve on Blue Cross is not substantially similar in nature and structure to those previously served by Blue Cross. The parties further agree that as to future interrogatories served in discovery, if the subparts to an interrogatory are factually or logically related to the primary question or directed at eliciting details concerning a common theme, those should be considered a single interrogatory, consistent with applicable law. ~~An interrogatory that asks for a response for each item in a series (*e.g.*, for each MFN, for each geographic market/area, for each occasion, for each hospital, for each meeting, and/or for each communication) shall be counted as a single interrogatory or a single sub-part.~~

Formatted: Bullets and Numbering

~~2.~~4. Service of Pleadings and Discovery on Other Parties. In accordance with LR 5.1, the parties shall serve all pleadings and other court filings on the opposing side using the Court's electronic filing system. Service of ~~-~~all discovery demands and responses, including notice of subpoenas to non-parties, shall be made by electronic mail to the persons designated below by the respective parties. Service of hard copies to the opposing side is not required. All documents are deemed served such that 3 days are added to the response period pursuant to Fed. R. Civ. P.6(d). The parties designate the following individuals to receive service of all discovery demands and responses:

a. For Plaintiff United States:

Amy R. Fitzpatrick	(202) 532-4558	amy.fitzpatrick@usdoj.gov
Barry J. Joyce	(202) 353-4209	barry.joyce@usdoj.gov
Steven Kramer	(202) 307-0997	steven.kramer@usdoj.gov

b. For Plaintiff State of Michigan:

M. Elizabeth Lippitt	(517) 373-1160	LippittE@michigan.gov

c. For Defendant Blue Cross Blue Shield of Michigan:

Todd M. Stenerson	(202) 419-2184	Tstenerson@hunton.com
D. Bruce Hoffman	(202) 955-1619	Bhoffman@hunton.com
Ashley Cummings	(404) 888-4223	Acummings@hunton.com
Jonathan Lasken	(202) 955-1983	Jlasken@hunton.com

~~[BCBSM to add.]~~

5. Federal Rule of Civil Procedure 45 Subpoenas.

a. A party serving a subpoena on a non-party for the production of documents, including electronically stored information, need not provide advance notice of the subpoena to the other parties.

b. If a party serves on a non-party a subpoena for the production of documents, including electronically stored information ("document subpoena"), and a subpoena commanding attendance at a deposition, the scheduled deposition date must be at least 14 days after the return date for the document subpoena. If extending the date of compliance for the document subpoena results in there being fewer than 14 days between the extended compliance date and the date scheduled for that non-party's deposition, the scheduled date for deposition must be postponed to be at least 14 days following the extended compliance date, unless the opposing party consents to there being fewer than 14 days. ~~If a party intends to cancel a non-party deposition that it previously noticed, the noticing party must give at least five days advance notice to the other side. The opposing side may then proceed with the deposition if it chooses, as if it had been the party noticing the deposition, without reissuing a deposition subpoena.~~

c. All modifications to the scope or date of compliance of a non-party document subpoena, agreed to by the party that served the subpoena, must be reduced to writing and emailed to all other parties within three business days after transmittal of the modifications to the subpoenaed non-party.

d. Whenever a party receives documents or electronically stored information in response to a non-party document subpoena, the receiving party must provide a complete copy of all materials, including documents, including electronically stored information, that it received to all other parties within seven calendar days following

receipt. If a non-party produces documents that are not Bates stamped, the party receiving the documents will Bates stamp them before producing a copy to the other parties.

6. Service of Trial Subpoenas. In view of the fact that potential witnesses in this action are located outside this judicial district and beyond 100 miles from this Court, the parties have shown the requisite good cause to permit the parties, pursuant to 15 U.S.C. § 23 to issue trial subpoenas that may run into any other federal judicial district requiring witnesses to attend this Court. ~~Notwithstanding the Court's order allowing parties to issue subpoenas to distant witnesses under 15 U.S.C. § 23, a party may present the testimony of a witness at trial via deposition if that witness is "unavailable" pursuant to the terms of Federal Rule of Civil Procedure 32(a)(4) or Federal Rule of Evidence 804(a).~~

~~6.~~7. ~~Exhibits and Exhibit Lists. The parties shall exchange electronic copies of numbered sets of all exhibits (other than demonstrative exhibits), and separately identifying exhibits the party expects to offer and may offer with lists of the exhibits itemizing each exhibit by date and document number (if applicable) and a brief description. These lists will be compiled in an agreed-upon electronic format that allows searching and sorting of exhibits by exhibit number, chronological order, and Bates stamp alphabetical and numerical order. Exhibit lists will be exchanged during pretrial disclosures after fact discovery closes.~~ Modification of Scheduling and Case Management Order. Any party may move the Court to amend or modify any of the provisions of either the Scheduling Order or Case Management Order for good cause shown and/or to set a status conference to address case management issues.

Formatted: Bullets and Numbering

SO ORDERED:

Dated at Detroit, Michigan, this ___, day of ___, 2011.

BY THE COURT:

_____
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND SUBSTANCE

Dated: _____, 2011

By: _____
[Name] [state bar number]
Attorney for Plaintiff United States of America
U.S. Department of Justice, Antitrust Division
450 Fifth Street, NW, Suite 4100
Washington, DC 20530
(202) xxx-xxxx
[email address]

By: _____
M. Elizabeth Lippitt P-70373
Attorney for Plaintiff State of Michigan
Assistant Attorney General
G. Mennen Williams Building, 6th Floor
525 W. Ottawa Street
Lansing, Michigan 48933
(517) 373-1160
lippitee@michigan.gov

By: _____
Todd Stenerson P51953
Attorney for Defendant
Blue Cross Blue Shield of Michigan
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006
(202) 955-1500
tstenerson@hunton.com

Exhibit 2

HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

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

ASHLEY CUMMINGS
DIRECT DIAL: 404-888-4223
EMAIL: acummings@hunton.com

FILE NO: 77535.00002

February 7, 2012

Via Email

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

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

Dear Amy:

Thank you for your email of February 3, 2012, which attached a redline of the proposed Case Management Order (CMO). As we indicated in prior discussions regarding the Case Management Order, we anticipated that the parties would be able to cooperate with respect to scheduling issues and other matters set forth in the draft CMO; and we are pleased that to date the parties have been able to do so.

Nevertheless, we continue to believe that a CMO coordinating discovery among the related cases would be beneficial for all litigants. *See* Nov. 10, 2011 letter from A. Cummings to A. Fitzpatrick. We see no need to ask the Court to consider a CMO that would apply only in the government action—particularly where the parties have proceeded quite well by agreement and without a CMO—when the real issues (e.g. civil plaintiffs' attendance at depositions, coordinated search terms, third-party documents and confidentiality designations) are issues related to coordination among the various litigants.

Regarding the proposed CMO that you provided on February 3, we do have these comments to the extent that CMO may be considered an effort to memorialize our agreement in certain respects:

- We noted previously that once depositions were underway, it was likely that some of the CMO subject-matter that both Plaintiffs and Blue Cross found difficult to negotiate in the abstract would be informed by experience. Based

HUNTON& WILLIAMS

on our experience scheduling and taking depositions since September 2011, when we last exchanged comments on a proposed Case Management Order, if we are to complete the necessary depositions before the close of fact discovery, we do not find it feasible to be bound to a hard rule on scheduling no more than two depositions on the same day. The ability to complete these depositions is contingent upon obtaining the third-parties' production and scheduling the depositions when those third parties' representatives are available. We will continue, as we have done to date, working with you on scheduling issues to the best of our ability.

- In paragraph 1(b), you have accurately stated the parties' practice to date. We want to clarify, however, that it is by no means our intention that the private class plaintiffs should have the unfettered right to attend and participate in depositions noticed in this action, without some corresponding obligation not to attempt to re-notice depositions of those same persons or entities. We have agreed to their attendance, to date, in an effort to facilitate coordinated discovery so that, where possible, discovery can occur only once. In view of the private class plaintiffs' reluctance to even comment on search terms and reservation of rights on that issue, we are concerned that our effort to facilitate coordinated discovery is one-sided.

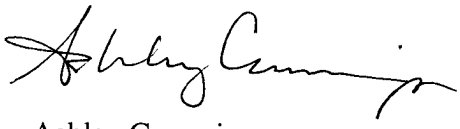
- Regarding paragraph 4(c), we have not engaged in modifications to the scope of subpoenas but to the extent we do so, it will be memorialized. As a general proposition, we have told hospitals that we expect them to search for documents in the possession of custodians known to most likely to have responsive documents rather than conducting an exhaustive company-wide search, and that the time limitation in the request (i.e., from 2004) did not require them to search archives or off-site storage locations. It has not been our practice to memorialize extensions of a third party's deadline to respond to a document subpoena. We have and will continue to notify you weekly of any such extensions.

This is not, however, intended to suggest that we consent to the submission of a proposed CMO in this matter when, in fact, what is really needed is a comprehensive CMO binding all litigants in the related litigation.

HUNTON& WILLIAMS

I would be happy to discuss these matters with you on Thursday at 11:30 a.m. during weekly call.

Sincerely,



Ashley Cummings

Enclosure

cc: Elizabeth Lippitt, Esq.
Todd M. Stenerson, Esq.

Exhibit 3

From: Cummings, Ashley [acummings@hunton.com]
Sent: Friday, February 17, 2012 3:13 PM
To: Fitzpatrick, Amy
Cc: Liebeskind, Richard L; Stenerson, Todd M.; Lasken, Jonathan H.
Subject: US v. BCBSM - CMO
Attachments: BCBSM - Draft Case Management Order_(37765050)_(4) (2) (2).rtf

Dear Amy:

As we discussed, here are Blue Cross's comments to the Case Management Order. Please do not hesitate to call if you would like to discuss.

Sincerely,
Ashley

<<BCBSM - Draft Case Management Order_(37765050)_(4) (2) (2).rtf>>

Ashley Cummings
HUNTON &
WILLIAMS
Bank of America Plaza
Suite 4100
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216

Dir (404) 888-4223
Fax (404) 888-4190
e-mail acummings@hunton.com
www.hunton.com

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, vs. BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No. 10-cv-14155-DPH-MKM Judge Denise Page Hood Magistrate Judge Mona K. Majzoub

[PROPOSED] CASE MANAGEMENT ORDER

Upon motion of plaintiffs, and in accordance with Fed. R. Civ. P. 16(b), the Court hereby ORDERS as follows:

1. Depositions of Fact Witnesses

a. Number of Depositions

Plaintiffs may take 170 depositions of fact witnesses. Defendant~~s~~ may take 170 depositions of fact witnesses. ~~Each side may take no more than two depositions on the same day (allowing a total number of four depositions per day), however, the parties may agree to more than two depositions per side per day (e.g., when multiple depositions of the same or related or geographically proximate witnesses may be scheduled and are reasonably anticipated to take less than a full day each).~~

b. Duration of Depositions

Formatted: Indent: Left: 0.06", First line: 0.44", Tab stops: Not at 0"

Formatted: Indent: Left: 1"

(1) Non-party Depositions. Absent a Court order extending the time or consent of the witness, non-party depositions shall be limited to one day of seven hours, during which the noticing party shall have at least five hours (including for redirect) and the adverse party shall have at least two hours. ~~If private plaintiffs in parallel litigation before this Court wish to participate in the deposition, with the consent of the witness, the private plaintiffs may use whatever portion of plaintiffs' time that the plaintiffs do not use, and the non-party may agree to extend the deposition beyond seven hours to allow the private plaintiffs to question the deponent.~~ If government and private plaintiffs, or defendant use less than their allotted time, the other side may continue until a total of seven hours is reached. To the extent the non-noticing party believes it needs more than two hours to question a non-party witness, that party may cross-notice the deposition.

(2) Party Depositions. Absent a Court order extending the time or agreement of counsel, party depositions shall be limited to one day of seven hours, during which the noticing party shall have at least seven hours (including for redirect). ~~If private plaintiffs in parallel litigation before this Court wish to participate in a deposition of defendant, the private plaintiffs may use whatever portion of the seven-hour time period that plaintiffs do not use, and the defendant may agree to extend the deposition beyond seven hours to allow the private plaintiffs to question the deponent.~~

(3) Coordination with Private Class Plaintiffs in Related Litigation. To date, the parties have cooperated as follows with respect to non-party depositions: If private plaintiffs in parallel litigation before this Court wish to participate in the deposition, with the consent of the parties and the witness, the private plaintiffs may use whatever portion of plaintiffs' time that the plaintiffs do not use, and the non-party may agree to extend the deposition beyond seven hours to allow the private plaintiffs to question the deponent; if government and private plaintiffs, or defendant use less than their allotted time, the other side may continue until a total of seven hours is reached. This does not, however, sufficiently address coordination of all the related litigation as it relates to the depositions or otherwise. Blue Cross therefore reserves all rights to seek relief from the Court to coordinate the various pieces of related litigation in order to protect the parties' interests, maximize efficiencies and minimize the burden not only to Blue Cross but to the many third-parties that are affected by discovery in this and related litigation.

Formatted: Indent: Left: 0.5"

2. Expert Depositions.

Formatted: No underline

Expert depositions may extend to two consecutive days of up to seven hours each day for each expert witness. ~~If private plaintiffs in parallel litigation before this Court also participate in the expert deposition, those private plaintiffs shall have two additional hours to question the deponent.~~ Unless the parties agree otherwise concerning a particular deposition, 14 days shall constitute reasonable notice of an expert deposition to the other side.

3. Service of Pleadings and Discovery on Other Parties

In accordance with LR 5.1, the parties shall serve all pleadings and other court filings on the opposing side using the Court's electronic filing system. Service of all discovery demands and responses, including notice of subpoenas to non-parties, shall be made by electronic mail to the persons designated below by the respective parties. Service of hard copies to the opposing side is not required. All documents are deemed served such that three days are added to the response period pursuant to Fed. R. Civ. P.6(d). The parties designate the following individuals to receive service of all discovery demands and responses:

a. For Plaintiff United States

Amy R. Fitzpatrick	(202) 532-4558	amy.fitzpatrick@usdoj.gov
Barry J. Joyce	(202) 353-4209	barry.joyce@usdoj.gov
Steven Kramer	(202) 307-0997	steven.kramer@usdoj.gov

b. For Plaintiff State of Michigan

M. Elizabeth Lippitt	(517) 373-1160	lippitte@michigan.gov

c. For Defendant Blue Cross Blue Shield of Michigan

Todd M. Stenerson	(202) 419-2184	tstenerson@hunton.com
D. Bruce Hoffman	(202) 955-1619	bhoffman@hunton.com
Ashley Cummings	(404) 888-4223	acummings@hunton.com
Jonathan Lasken	(202) 955-1983	jlasken@hunton.com

4. Federal Rule of Civil Procedure 45 Subpoenas

a. A party serving a subpoena on a non-party for the production of documents, including electronically stored information, need not provide advance notice of the subpoena to the other parties.

b. If a party serves on a non-party a subpoena for the production of documents, including electronically stored information ("document subpoena"), and a subpoena commanding attendance at a deposition, the scheduled deposition date must be at least 14 days after the return date for the document subpoena. If extending the date of compliance for the document subpoena results in there being fewer than 14 days between the extended compliance date and the date scheduled for that non-party's deposition, the scheduled date for deposition may~~ust~~ be postponed to be at least 14 days following the extended compliance date, unless the opposing party consents to there being fewer than 14 days.

c. All modifications to the scope ~~or date of compliance~~ of a non-party document subpoena, agreed to by the party that served the subpoena, must be reduced to writing and emailed to the~~all~~ other parties within five~~three~~ business days after agreement to the modifications with the subpoenaed non-party. Any extension of the date of compliance of a non-party document subpoena, agreed to by the party that served the subpoena, should be communicated to the other parties within five days after agreement to the extension.

d. Whenever a party receives documents or electronically stored information in response to a non-party document subpoena, the receiving party must provide a complete copy of all materials, including documents, including electronically stored information, that it received to all other parties within seven calendar days following receipt. If technical problems with the non-party production prevent meeting this deadline, the receiving party shall promptly notify the other parties and provide copies as soon as practical. If a non-party produces documents that are not Bates stamped, the party receiving the documents will Bates stamp them before producing a copy to the other parties.

~~5.Service of Trial Subpoenas~~

Formatted: Bullets and Numbering

~~In view of the fact that potential witnesses in this action are located outside this judicial district and beyond 100 miles from this Court, the parties have shown the requisite good cause to permit the parties, pursuant to 15 U.S.C. § 23, to issue trial subpoenas that may run into any other federal judicial district requiring witnesses to attend this Court.~~

~~6.~~5. Modification of Scheduling and Case Management Order

Formatted: Bullets and Numbering

Any party may move the Court to amend or modify any of the provisions of either the Scheduling Order or Case Management Order for good cause shown and/or to set a status conference to address case management issues.

Blue Cross agrees to this Case Management Order as it reflects the parties' agreements to date, but Blue Cross will separately move the Court to enter a broader Case Management Order that addresses coordination among and between the parties in related litigation.

SO ORDERED:

Dated at Detroit, Michigan, this ____ day of _____, 2012~~1~~.

BY THE COURT:

_____
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND SUBSTANCE

Dated: February~~September~~ _, 2012~~1~~ By:

By: Ryan Danks
Attorney for Plaintiff United States of America U.S. Department of Justice, Antitrust Division 450 Fifth Street, NW, Suite 4100
Washington, DC 20530

(202) 305-0128
ryan.danks@usdoj.gov

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

By: Todd Stenerson P51953
Attorney for Defendant
Blue Cross Blue Shield of Michigan
Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006
(202) 955-1500
tstenerson@hunton.com

Exhibit 4

From: Kramer, Steven
Sent: Monday, February 27, 2012 10:16 AM
To: 'martinj@hunton.com'
Cc: 'LippittE@michigan.gov'; 'JLipton@gibsondunn.com'; 'tangren@whafh.com'; 'vlewis@gibsondunn.com'; 'rwalters@gibsondunn.com'; 'dmatheson@gibson.com'; 'Stenerson, Todd M.'; 'LYoung@sommerspc.com'; 'jthompson@sommerspc.com'; 'cjohnson@hallrender.com'
Subject: RE: Follow up to Friday Meet and Confer

Dear Mr. Martin:

We have not met, nor did I participate in what Blue Cross has styled as a meet-and-confer conversation on Friday afternoon, February 24, during a call convened ostensibly to discuss today's deposition of Jodi McDonald of Managed Care Partners with all of the private parties. During that call, without any advance notice, Todd Stenerson asked all parties if they concurred with Blue Cross's stated intent to move on Friday for a 90-day stay of deposition discovery in either all actions or in the private actions. My colleague Ryan Danks, who is now in Chicago taking Ms. McDonald's deposition, reported that Mr. Stenerson's stated reason was to coordinate discovery among all of the actions and to allow the private damages cases to catch up to our enforcement action.

The United States believes that plaintiffs' informal coordination of discovery that has been employed to date has worked well and that Blue Cross's views to the contrary are based largely on problems that it itself has created. For example, Blue Cross's claim that the confidentiality protective orders need to be reconciled across all actions results from Blue Cross's decision to demand a protective order in the *Aetna* case that differs in substantial ways from the order entered by the Court in this action. As we have stated to Mr. Stenerson for over a year, and have stated in Court filings, informal coordination of discovery is the best solution to reconcile the competing interests. We believe that deposition discovery in our case should proceed with private plaintiffs participating informally in that discovery, which has worked well to date. Any discussions that Blue Cross may wish to hold regarding further coordination or problems that is believes have arisen, should proceed concurrently. Blue Cross has had over a year to conduct such discussions and has failed to offer any meaningful proposal. We see no reason why its failure to do so now warrants a stay of deposition discovery in this enforcement action that Congress has directed be adjudicated "as soon as may be."

Finally, we note that the abrupt manner and false urgency with which Blue Cross has infused its purported meet and confer on this motion have the potential to needlessly burden the Court. Your approach stands in stark contrast to the extensive efforts that we have undertaken to attempt to reach agreement on a proposed case-management order with Blue Cross, which we believe would facilitate informal coordination of discovery in this case with the private actions. Your message below, sent yesterday on a Sunday afternoon and demanding a response by noon today, serves only to underline the lack of any good-faith effort by Blue Cross to discuss the issues that it contends form the basis for its stay motion. In short, as your message implies, we have had no meaningful discussions on any of the three issues you have raised, to say nothing of any other issues that you have reserved. We hope that Blue Cross will reconsider filing its motion and proceed with the discussions it professes to want to hold, but has failed to initiate to date. Your motion's request for three months to discuss the issues suggests that three hours today is hardly an adequate time for those discussions.

Sincerely yours,
Steve Kramer

Steve Kramer

Antitrust Division
Department of Justice
Suite 4100
450 5th Street, N.W.
Washington, D.C. 20530

Tel: (202) 307-0997
Fax: (202) 305-1190
email: steven.kramer@usdoj.gov

From: Martin, Jack
To: Stenerson, Todd M. ; LYoung@sommerspc.com ; jthompson@sommerspc.com
Cc: Lipton, Joshua ; Johnson, Clifton E. ; Danks, Ryan; Joyce, Barry; LippittE@michigan.gov ; tangren@whafh.com ; Lewis, Veronica S. ; Walters, Robert C. ; Matheson, Dan
Sent: Sun Feb 26 15:07:21 2012
Subject: Follow up to Friday Meet and Confer

Dear counsel: At the end of our meet and confer Friday, it was clear that we were at impasse. We asked all parties to either: (1) agree to a 90-day stay for the taking of depositions in all cases, to allow the private plaintiffs to catch up on document discovery, and address other coordination issues, or (2) stay discovery in the private plaintiff actions pending resolution of the DOJ Action, (allowing the parties in the later actions to use the discovery developed by the DOJ to avoid duplication, and only allowing additional discovery that is non-duplicative).

We did not receive unanimous consent from the private plaintiffs to either option, and the DOJ was definitively opposed to option one.

Although we were at impasse, the DOJ asked, after Friday's call, that we defer filing our motion until Monday, so it could determine whether or not it agreed to option two. In addition, several parties asked to see our draft motion or an outline thereof.

We have agreed to the DOJ's request and will be advised of its final position on option two by noon Monday. We intend to file our motion at that time, advising the court of DOJ's final position, as it is clear that, whatever DOJ says, we will not have agreement by all plaintiffs on one of the two options.

Regarding your request, our motion will be based on the clear inefficiency of attempting to conduct discovery simultaneously in at least four separate cases, without having adequately planned for how to coordinate discovery across those cases. The last minute Aetna document production before the McDonald deposition tomorrow is one example of many inefficiencies.

Either of the two options would be used, perhaps in slightly different ways, to address the lack of coordination with respect to at least the following issues:

1-- Protective order. The protective order needs to be consistent across all cases, and should address HIPAA, review by parties of the evidence against them, access by all parties to third party information, designation by a party of its confidential information incorporated into that party's documents, etc.

2. Search terms. Document searches should be run once and only once. That cannot happen under the pressure of the urgent deposition schedule, while Blue Cross is negotiating terms with DOJ, but

the other parties lag behind both in
providing their own terms and in commenting on those of Blue Cross.

3. Document productions. All parties need to produce all documents related to a given deposition before that deposition happens, with enough time for adequate preparation. In addition, there are several third parties who have received multiple subpoenas from different parties. We all need time to coordinate on this issue to minimize the burden on third parties.

The above does not purport to be an exhaustive list, nor are we requesting a meet and confer on these issues right now. Rather, the existence of these, and no doubt other, discovery coordination issues is why we request all parties' agreement to either option one or two above. If by noon Monday we continue to lack unanimous consent to one option or the other, we will file our motion.

Best regards,

Jack Martin
Hunton & Williams

Exhibit 5

From: Martin, Jack [martinj@hunton.com]
Sent: Sunday, February 26, 2012 3:07 PM
To: Stenerson, Todd M.; LYoung@sommerspc.com; jthompson@sommerspc.com
Cc: Lipton, Joshua; Johnson, Clifton E.; Danks, Ryan; Joyce, Barry; LippittE@michigan.gov; tangren@whafh.com; Lewis, Veronica S.; Walters, Robert C.; Matheson, Dan
Subject: Follow up to Friday Meet and Confer

Dear counsel: At the end of our meet and confer Friday, it was clear that we were at impasse. We asked all parties to either: (1) agree to a 90-day stay for the taking of depositions in all cases, to allow the private plaintiffs to catch up on document discovery, and address other coordination issues, or (2) stay discovery in the private plaintiff actions pending resolution of the DOJ Action, (allowing the parties in the later actions to use the discovery developed by the DOJ to avoid duplication, and only allowing additional discovery that is non-duplicative).

We did not receive unanimous consent from the private plaintiffs to either option, and the DOJ was definitively opposed to option one.

Although we were at impasse, the DOJ asked, after Friday's call, that we defer filing our motion until Monday, so it could determine whether or not it agreed to option two. In addition, several parties asked to see our draft motion or an outline thereof.

We have agreed to the DOJ's request and will be advised of its final position on option two by noon Monday. We intend to file our motion at that time, advising the court of DOJ's final position, as it is clear that, whatever DOJ says, we will not have agreement by all plaintiffs on one of the two options.

Regarding your request, our motion will be based on the clear inefficiency of attempting to conduct discovery simultaneously in at least four separate cases, without having adequately planned for how to coordinate discovery across those cases. The last minute Aetna document production before the McDonald deposition tomorrow is one example of many inefficiencies.

Either of the two options would be used, perhaps in slightly different ways, to address the lack of coordination with respect to at least the following issues:

1-- Protective order. The protective order needs to be consistent across all cases, and should address HIPAA, review by parties of the evidence against them, access by all parties to third party information, designation by a party of its confidential information incorporated into that party's documents, etc.

2. Search terms. Document searches should be run once and only once. That cannot happen under the pressure of the urgent deposition schedule, while Blue Cross is negotiating terms with DOJ, but the other parties lag behind both in
providing their own terms and in commenting on those of Blue Cross.

3. Document productions. All parties need to produce all documents related to a given deposition before that deposition happens, with enough time for adequate preparation. In addition, there are several third parties who have received multiple subpoenas from different parties. We all need time to coordinate on this issue to minimize the burden on third parties.

The above does not purport to be an exhaustive list, nor are we requesting a meet and confer on these issues right now. Rather, the existence of these, and no doubt other, discovery coordination issues is why we request all parties' agreement to either option one or two above. If by noon

Monday we continue to lack unanimous consent to one option or the other, we will file our motion.

Best regards,

Jack Martin
Hunton & Williams

Exhibit 6

U.S. Department of Justice

Antitrust Division

Liberty Square Building
450 5th Street, NW
Washington, DC 20001
(202) 307-0997
steven.kramer@usdoj.gov

February 18, 2011

Via E-Mail
tstenerson@hunton.com

Todd M. Stenerson
Hunton & Williams LLP
1900 K Street, N.W.
Washington, DC 20006

RE: *United States v. Blue Cross Blue Shield of Michigan*, C.A. No. 2:10cv14155-DPH-MKM

Dear Mr. Stenerson:

Your February 14, 2011 letter to Barry Joyce states, in part, that "on multiple occasions" you have solicited "concrete proposals as to how Government Plaintiffs plan to coordinate discovery with private civil plaintiffs" and that you would "appreciate receiving one." Your claim of such multiple solicitations comes as news to us.

Aside from our being unaware of any such solicitation, we fail to understand how you would have even expected us to submit such a proposal. Since your colleague Bruce Hoffman first broached the issue of coordinating discovery in this case with the then pending two "tag-along"damage actions on January 4, the United States has stated that we would attempt to coordinate with the private actions on an informal basis that would not delay or interfere with the expeditious prosecution of this action. We made this point again at the Parties' Rule 26(f) conference on January 10 and again, on January 24, in the Parties'Joint Rule 26(f) Report and Discovery Plan (Docket No. 19, at pp. 5-6) where the United States stated its position on coordination as follows: "Consistent with Congress's expressed intent that suits brought by the United States in antitrust actions proceed without delay, *see e.g.* 15 U.S.C. § 4, Plaintiffs will attempt to informally coordinate discovery, to the extent feasible, with the private plaintiffs who have filed related suits." Finally, our Opposition to the Motion to Stay Discovery filed on February 16 (Docket No. 27) since we received your letter, again objects to any formal coordination of discovery in this case with private "tag-along" damages actions as contrary to federal statutes and Congressional policy that antitrust enforcement actions brought by the United States proceed expeditiously, unencumbered by the delays associated with private, class-action, damages litigation. As we have stated repeatedly, Plaintiffs in this action will attempt to informally coordinate discovery with the private plaintiffs who have filed "tag-along" damage actions (to which Plaintiffs are not parties), to the extent such coordination does not interfere with the expeditious prosecution of this case.

Moreover, before Plaintiffs can begin to attempt to informally coordinate discovery with the private plaintiffs, Blue Cross must provide additional information to us, including a proposed discovery schedule in those actions.

Please let me know if you have any question.

Sincerely yours,

/s/

Steven Kramer

cc: David Higbee
Bruce Hoffman
Jonathan Lasken
Barry Joyce
Ann Marie Blaylock
Elizabeth Lippitt

Exhibit 7

U.S. Department of Justice

Antitrust Division

Liberty Square Building
450 Fifth Street, NW
Washington, DC 20001
(202) 307-0997

April 6, 2011

Via Email
tstenerson@hunton.com

Todd Stenerson
Hunton & Williams
1900 K Street, NW
Washington, DC 20006

Re: United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Case No. 2:10-cv-14155-DPH-MKM

Dear Todd:

This letter follows our conversation during the Rule 26(f) conference hosted by the plaintiff City of Pontiac on March 29, 2011, when you requested more information regarding how the United States and State of Michigan (Plaintiffs) intend to coordinate discovery in this action with discovery in the private tag-along damages actions.

As we have stated to you since we first began discussing coordination with you back in January, our position remains that we are willing to informally coordinate discovery on Blue Cross with private plaintiffs to the extent that this coordination does not delay or interfere with prosecution of this case. We will object to any formal coordination of discovery with private plaintiffs' damages actions, and we intend to resist any coordination of discovery that delays the prosecution of this action. We refer you to our February 18, 2011 letter to you and our February 16, 2011 Opposition to the Motion to Stay Discovery (Docket No. 27) for the basis for our position.

In terms of coordinating discovery schedules, we circulated our revised proposed scheduling order a few weeks ago to you and to private plaintiffs. In response, several of the private plaintiffs have responded that they believe it may be feasible to enter into a similar discovery schedule with Blue Cross. As we discussed on March 29, however, Blue Cross's ongoing refusal to produce to private plaintiffs a copy of the documents it already produced to Plaintiffs during their preceding investigations will likely impede the private plaintiffs' ability to "catch up" and coordinate discovery schedules with Plaintiffs

in this case. Blue Cross' delay of discovery in the private cases should not result in delays to this case.

We welcome any feedback you have on the revised proposed scheduling order we sent you on March 24. We also continue to await your response to the request in our February 18, 2011 letter that Blue Cross facilitate informal coordination of discovery by providing additional information to us, including Blue Cross's proposed discovery schedule in the private actions. In the absence of a response from you on your proposed scheduling order in the private cases and in the absence of the parties moving towards agreement on a proposed scheduling order in this case, it appears largely academic to discuss further the details of coordination of discovery schedules with private plaintiffs. In an attempt to move forward, however, we offer the following approach in concept.

Your March 16, 2011 letter asked about coordinating depositions of Blue Cross employees. For any depositions we notice of Blue Cross employees, we anticipate giving notice to plaintiffs in the private actions, and we will work with Blue Cross and private plaintiffs to schedule the deposition on a date that is convenient to all, to the extent that rescheduling the deposition does not prejudice Plaintiffs. Giving notice to private plaintiffs of depositions we schedule for Blue Cross employees should allow Blue Cross ample opportunity to work out with private plaintiffs any arrangements necessary for additional time for questions they may have for Blue Cross employees in the private actions.

We also anticipate providing advance notice to private plaintiffs of any document requests we plan to serve on Blue Cross, which will allow private plaintiffs to provide input into any document requests we serve on Blue Cross. We expect that, despite this coordination, private plaintiffs will likely choose to issue their own document request(s) to Blue Cross relating to issues not present in our case, such as class certification. We also expect that any disputes that may arise solely between Blue Cross and private plaintiffs over the appropriate scope of a document request would not affect Blue Cross's compliance with any document requests that we serve on Blue Cross.

We believe this letter responds to your request regarding coordination of discovery. If you envision coordination occurring under a framework significantly different from what we have described in this letter, please either give us a call or send us a counterproposal.

Sincerely yours,

/s/

Steven Kramer

cc: Barry Joyce
Ryan Danks
Elizabeth Lippitt
Bruce Hoffman
David Higbee
All counsel on the City of Pontiac's Rule 26 email list

Exhibit 8

From: Lipton, Joshua [JLipton@gibsondunn.com]
Sent: Sunday, February 26, 2012 4:05 PM
To: Martin, Jack; Stenerson, Todd M.; LYoung@sommerspc.com; jthompson@sommerspc.com
Cc: Danks, Ryan; Joyce, Barry; LippittE@michigan.gov; tangren@whafh.com; Lewis, Veronica S.; Walters, Robert C.; Matheson, Dan
Subject: RE: Follow up to Friday Meet and Confer

Jack,
I would like to offer a few points in response to your email. First, we cannot agree that we are at an impasse with respect to your proposal because you have not even provided the details of your proposal, as we requested on Friday, to give Aetna an opportunity to respond. We do not agree that you have satisfied your obligation to meet and confer in good faith about your proposal when (a) you announced your proposal for the first time on a conference call that was convened for another purpose, (b) our response on that conference call was that we needed more information about the details of your proposal, and (c) you have not provided those details. If you are far enough along that you have a motion prepared to file tomorrow, you certainly should be able to provide us with the details of your proposal. Accordingly, your announcement today that we are at an impasse – when you still have not provided the full details of the proposal you first raised on Friday afternoon, and we have not been given a full opportunity to evaluate that proposal – seems misguided.

Second, we feel it is important to make sure the record is clear that the various issues you raise with respect to the timing and coordination of discovery are largely, if not entirely, the product of Blue Cross's own approach to discovery. For example, it is Blue Cross – and Blue Cross alone – that has pressed for a modification of the protective order(s). We told you repeatedly that Aetna would agree to a protective order in the form of the DOJ case and the private class cases, but Blue Cross insisted on an order in a different form. Accordingly, Blue Cross should not now be heard to argue that its insistence on changing the form of the protective order is a basis for some relief that Blue Cross seeks.

Similarly, Blue Cross has been fully aware of the Aetna action for nearly three months, and yet Blue Cross has used the bulk of that time to drag its feet and delay Aetna's participation in discovery. For example, Blue Cross unilaterally blocked Aetna's participation in depositions in December and January, and Blue Cross has unilaterally instructed a number of third parties not to produce documents to Aetna. In all respects, Aetna has been trying since early December to accelerate discovery, whereas Blue Cross has done everything possible to slow things down. Indeed, it is only when Blue Cross has been pushed to the very brink of motions to the court (e.g., a motion for entry of a protective order, and a motion to compel production of Blue Cross's DOJ production) that Blue Cross has been prompted to move forward in any meaningful way. For Blue Cross now to use these various delay tactics – that are entirely of Blue Cross's creation – as a justification for seeking to delay the progress of discovery in Aetna's case is entirely unacceptable.

Likewise, we are shocked to see you cite your delays in formulating a search term list as a basis for staying discovery in any of these cases, and particularly the Aetna litigation. We have told you for weeks that we would bend over backwards to ensure that Aetna's comments on the search terms would not delay your formulation of electronic search terms. In that regard, we have provided you with prompt feedback on your electronic discovery issues. Your responses to that feedback have been agonizingly slow. For example, we wrote to you 23 days ago requesting that four custodians be asked to Blue Cross's list of custodians, and you have not yet responded to that simple request. We are, frankly, at a loss to understand why you have not finalized and moved forward with the search protocols that you said were nearly finalized in early January. Once again, for Blue Cross to use its own failure to move forward with the simplest of discovery responsibilities as a basis for delaying progress in Aetna's case is entirely unacceptable.

Moreover, to the extent you are attributing your request for delay on Aetna's production of documents, you are particularly misguided. As we have stated to you repeatedly, Aetna will complete its document production on the same schedule or earlier as Blue Cross's own production of documents in any of the related cases. To that end, we responded to your written requests for production in approximately half the time allotted under the rules, and we began a substantial production of documents promptly after a protective order was entered. In both regards, our actions stand in stark contrast to Blue Cross's efforts to drag out the process to the maximum extent possible. Indeed, we have

already produced thousands of pages of substantive documents in response to requests for production that you served just over a month ago. We have also agreed to your request to front-load particular aspects of our document production, including focused productions that we made to you last week. Accordingly, the timing of Aetna's document productions is not a legitimate reason to delay discovery in Aetna's case.

In any event, even despite Blue Cross's efforts to drag its feet and delay Aetna's participation in discovery – which now appear to have been geared toward justifying the stay and the fracturing of coordinated litigation that you now propose – the concerns you express are overblown. If there are legitimate concerns to be addressed with regard to coordinating discovery in the various cases, we should meet and confer to discuss means to coordinate discovery. We are not aware of any efforts Blue Cross has undertaken in that regard. This is another way in which your efforts to meet and confer fall far short.

As we indicated on Friday, we are available at your convenience to meet and confer about these and any other issues.

Regards.

Joshua Lipton

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
Tel +1 202.955.8226 • Fax +1 202.530.9536
JLipton@gibsondunn.com • www.gibsondunn.com

From: Martin, Jack [mailto:martinj@hunton.com]
Sent: Sunday, February 26, 2012 3:07 PM
To: Stenerson, Todd M.; LYoung@sommerspc.com; jthompson@sommerspc.com
Cc: Lipton, Joshua; Johnson, Clifton E.; Danks, Ryan; Joyce, Barry; LippittE@michigan.gov; tangren@whafh.com; Lewis, Veronica S.; Walters, Robert C.; Matheson, Dan
Subject: Follow up to Friday Meet and Confer

Dear counsel: At the end of our meet and confer Friday, it was clear that we were at impasse. We asked all parties to either: (1) agree to a 90-day stay for the taking of depositions in all cases, to allow the private plaintiffs to catch up on document discovery, and address other coordination issues, or (2) stay discovery in the private plaintiff actions pending resolution of the DOJ Action, (allowing the parties in the later actions to use the discovery developed by the DOJ to avoid duplication, and only allowing additional discovery that is non-duplicative).

We did not receive unanimous consent from the private plaintiffs to either option, and the DOJ was definitively opposed to option one.

Although we were at impasse, the DOJ asked, after Friday's call, that we defer filing our motion until Monday, so it could determine whether or not it agreed to option two. In addition, several parties asked to see our draft motion or an outline thereof.

We have agreed to the DOJ's request and will be advised of its final position on option two by noon Monday. We intend to file our motion at that time, advising the court of DOJ's final position, as it is clear that, whatever DOJ says, we will not have agreement by all plaintiffs on one of the two options.

Regarding your request, our motion will be based on the clear inefficiency of attempting to conduct discovery simultaneously in at least four separate cases, without having adequately planned for how to coordinate discovery across those cases. The last minute Aetna document production before the

McDonald deposition tomorrow is one example of many inefficiencies.

Either of the two options would be used, perhaps in slightly different ways, to address the lack of coordination with respect to at least the following issues:

1-- Protective order. The protective order needs to be consistent across all cases, and should address HIPAA, review by parties of the evidence against them, access by all parties to third party information, designation by a party of its confidential information incorporated into that party's documents, etc.

2. Search terms. Document searches should be run once and only once. That cannot happen under the pressure of the urgent deposition schedule, while Blue Cross is negotiating terms with DOJ, but the other parties lag behind both in
providing their own terms and in commenting on those of Blue Cross.

3. Document productions. All parties need to produce all documents related to a given deposition before that deposition happens, with enough time for adequate preparation. In addition, there are several third parties who have received multiple subpoenas from different parties. We all need time to coordinate on this issue to minimize the burden on third parties.

The above does not purport to be an exhaustive list, nor are we requesting a meet and confer on these issues right now. Rather, the existence of these, and no doubt other, discovery coordination issues is why we request all parties' agreement to either option one or two above. If by noon Monday we continue to lack unanimous consent to one option or the other, we will file our motion.

Best regards,

Jack Martin
Hunton & Williams

Exhibit 9

HUNTON & WILLIAMS

HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

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

JONATHAN H. LASKEN
DIRECT DIAL: 202 • 955 • 1983
EMAIL: JLasken@hunton.com

FILE NO: 77535.000002

March 5, 2012

Via Overnight Delivery

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

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

Dear Amy:

Please find enclosed a hard drive containing documents responsive to Plaintiffs' Second Request for Production of Documents. These documents are bates-numbered BLUECROSSMI-99-701784 - BLUECROSSMI-99-844758.

The enclosed documents that are confidential are designated CONFIDENTIAL and are subject to the Stipulated Protective Order Concerning Confidentiality. Confidentiality designations for native files may be found on the corresponding tiff image. If you cannot link a native to tiff image, please treat the native as confidential.

By copy of this letter, I am notifying Aetna of the production of these documents. We are not at this time producing the documents to Aetna, as they have not yet been designated for confidentiality under the two tier structure of the protective order in the Aetna case. If Aetna is willing to treat all documents stamped "Confidential" in this production as "Highly Confidential" under the terms of the Aetna protective order, then we will promptly produce these documents to Aetna.

We have asked the Department of Justice and Shane Group plaintiffs for input on the Aetna protective order, with hopes that it could serve as a model for one consolidated protective order. The confusion caused by the different treatment of the same documents under different protective orders is one of the many reasons we have sought relief in our motion for protective order now pending before the Court.

HUNTON& WILLIAMS

Sincerely,

Jonathan H. Lasken

Enclosure

cc: Elizabeth Lippett, Esq.
Thomas Marks, Esq. (w/o enclosure)
John Tangren, Esq.
Josh Lipton, Esq. (w/o enclosure)
Ashley Cummings, Esq.

Exhibit 10

From: Lipton, Joshua [JLipton@gibsondunn.com]
Sent: Wednesday, March 07, 2012 11:06 AM
To: Lasken, Jonathan H.; Fitzpatrick, Amy
Cc: Elizabeth Lippitt; Marks, Thomas (AG); tangren@whafh.com; Cummings, Ashley; Lewis, Veronica S.; Matheson, Dan
Subject: RE: Letter Enclosing BLUECROSSMI-99-701784 - BLUECROSSMI-99-844758

Jonathan,
Going forward, please also copy Dan Matheson and Veronica Lewis on all correspondence to us (I am copying them on this email).

In response to your letter, I have to confess that I am confused. You say you have not designated your documents under the two-tier confidentiality structure and therefore you want Aetna to treat all of the documents under the highest level of confidentiality. But it was Blue Cross that requested and insisted upon the two-tier confidentiality structure. Starting back in December, we told you that Aetna was amenable to entering into the same confidentiality order that was in place in the DOJ case and the class cases. Yet Blue Cross insisted on doing something different.

If Blue Cross wants to revert to / stay with a one-tier system, we would be fine with that – and we should have done it that way in the first place, as we suggested in December. On the other hand, if Blue Cross wants to keep the two-tier system that it insisted upon in the *Aetna* protective order, then it should code its documents accordingly and not put us in the position you request in your letter. (In this regard, I note that Aetna is coding documents according to the two-tier system requested by Blue Cross.)

I also note that it would be simple for you to comply with both types of protective orders in your document coding. The two tiers in the protective order that you authored in the *Aetna* litigation are labeled "Highly Confidential" and "Confidential IH." The one tier in the other order is labeled "Confidential." So, if you code your confidential documents for the two tiers in the *Aetna* order, all of your confidential documents will have the word "Confidential" stamped on them, which is surely sufficient for the other orders.

With all of that said, if your failure to comply with the coding in the protective order (which you wrote) for this production is a one-off occurrence – for example, if you reviewed and marked these documents for production prior to entry of the confidentiality order in the *Aetna* case – and if you can assure us that this is not the first step in a larger effort by Blue Cross to avoid complying with the two-tier system upon which Blue Cross insisted (and with which Aetna is complying), then we would be willing to treat this production under the same terms that apply to Blue Cross's productions prior to February 9, 2012. That is, we are willing to agree to your request to treat documents in this production labeled "Confidential" under the highest confidentiality designation, provided that we can take advantage of the de-designation procedure as appropriate.

Please let us know.

Regards.
--Josh

Joshua Lipton

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W., Washington, DC 20036-5306
Tel +1 202.955.8226 • Fax +1 202.530.9536
JLipton@gibsondunn.com • www.gibsondunn.com

From: Lasken, Jonathan H. [mailto:JLasken@hunton.com]
Sent: Monday, March 05, 2012 6:01 PM

To: Fitzpatrick, Amy
Cc: Elizabeth Lippitt; Marks, Thomas (AG); tangren@whafh.com; Lipton, Joshua; Cummings, Ashley
Subject: Letter Enclosing BLUECROSSMI-99-701784 - BLUECROSSMI-99-844758

All,

Please see the attached correspondence. For those receiving enclosures, hard copies were sent via overnight mail today.

Best,
Jonathan

Exhibit 11

KATHLEEN CHAUVIN, Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.

CIVIL ACTION NO. 10-CV-11735

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2011 U.S. Dist. LEXIS 50522

May 11, 2011, Decided
May 11, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *Chauvin v. State Farm Mut. Auto. Ins. Co., 2011 U.S. Dist. LEXIS 52145 (E.D. Mich., May 16, 2011)*

COUNSEL: [*1] For Kathleen Chauvin, as Guardian and Conservator of Joseph Chauvin, a legally incapacitated person, Plaintiff: Benjamin S. Reifman, LEAD ATTORNEY, Liss Seder & Andrews, P.C., Bloomfield Hills, MI; Nicholas S. Andrews, Liss Assoc., Bloomfield Hills, MI.

For State Farm Mutual Automobile Insurance Company, Defendant: Michael W. Slater, Hewson & Van Hellemont, P.C., Grand Rapids, MI.

JUDGES: MAGISTRATE JUDGE MONA K. MAJZOUB. DISTRICT JUDGE ARTHUR J. TARNOW.

OPINION BY: MONA K. MAJZOUB

OPINION

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR A PROTECTIVE ORDER AS TO THE DEPOSITION DUCES TECUM OF PATRICIA PARR-ARMELAGOS (DOCKET NO. 9), GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL DEFENDANT EMPLOYEE PAT PARR-ARMELAGOS TO ANSWER DEPOSITIONS QUESTIONS (DOCKET NO. 21) AND DENYING DEFENDANT'S MOTION TO TERMINATE DEPOSITION PURSUANT TO FRCP 30 (DOCKET NO. 33)

This matter comes before the Court on three motions related to the same deposition. The first is Defendant State Farm Automobile Insurance Company's Motion For A Protective Order As To The Deposition Duces Tecum Of Patricia Parr-Armelagos And Brief In Support filed on October 5, 2010. (Docket no. 9). Plaintiff filed a Response [*2] on October 19, 2010. (Docket no. 12). Defendant filed a Reply on October 27, 2010. (Docket no. 17).

The second motion is Plaintiff's Motion To Compel Defendant Employee Pat Parr-Armelagos To Answer Depositions (sic) Questions filed on October 29, 2010. (Docket no. 21). Defendant filed a Response on November 23, 2010. (Docket no. 32). Plaintiff filed a Reply on November 24, 2010. (Docket no. 34). The parties filed a Joint Statement of Unresolved Issues on January 31, 2011. (Docket no. 57).

The third motion is Defendant's Motion To Terminate Deposition Pursuant to *FRCP 30* filed on November 23, 2010. (Docket no. 33). Plaintiff filed a Response to this Motion, also serving as the Reply to Plaintiff's Motion To Compel (docket no. 21) on November 24, 2010. (Docket no. 34). In this instance the Court will allow the document at docket no. 34 to function as both the Reply and a Response because the issues are the same and Plaintiff has clearly identified it as such in the caption. The parties filed a Joint Statement of Unresolved Issues on January 31, 2011. (Docket no. 59). The matters were referred to the undersigned for decision pursuant to *28 U.S.C. § 636(b)(1)(A)*. (Docket no. 14, 35). The [*3] Court dispenses with oral argument pursuant to *E.D. Mich. LR 7.1(f)*. The issue of the Parr-Armelagos Deposition is fully briefed and the motions are now ready for ruling.

Plaintiff, the guardian and conservator of Joseph Chauvin, brings this action seeking to recover attendant care benefits pursuant to Michigan's No-Fault Act. Plaintiff argues that her ward, Joseph Chauvin was insured by Defendant when he was involved in a June 22, 1993 automobile accident in which he sustained injuries. The parties have filed many discovery motions in this matter. Herein the Court rules on three motions involving the Deposition of Patricia Parr-Armelagos, a State Farm employee.

A. Defendant's Motion For A Protective Order As To The Deposition Duces Tecum Of Patricia Parr-Armelagos (Docket no. 9)

Plaintiff served a Re-Notice of Taking Video Deposition *Duces Tecum* on deponent Pat Parr-Armelagos ("Deponent") on September 21, 2010. (Docket no. 9-2). The Re-Notice asks the Deponent to produce at deposition five categories of information: The first four categories are documents and the fifth is her laptop computer. (Docket no. 9-2). Defendant objects to category nos. 2 through 5 in the Re-Notice. (Docket no. [*4] 9 p. 12 of 27).

Defendant is seeking a protective order pursuant to *Fed. R. Civ. P. 26(c)* and *34(b)*. For good cause shown, the court may issue an order to protect a party or person "from annoyance, embarrassment, oppression, or undue burden or expense." *Fed. R. Civ. P. 26(c)*. Good cause is established with "specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and [the moving party] cannot rely on mere conclusory statements." *Nix v. Sword, 11 Fed. App'x 498, 500 (6th Cir. 2001)* (quoting *Avirgan v. Hull, 118 F.R.D. 252, 254 (D.D.C. 1987)*); *Underwood v. Riverview of Ann Arbor*, 2008 U.S. Dist. LEXIS 107323, *6, 2008 WL 5235992 (E.D.Mich. Dec. 15, 2008).

1. "Advancing Claims Excellence" (ACE) Documents

Category or paragraph no. 2 of the Re-Notice of Deposition asks for specific Michigan Advancing Claims Excellence (ACE) file documents. Defendant argues that these documents "were generated as part of a self-critical audit of various automobile claim files, handled exclusively by State Farm's Michigan Region." (Docket no. 9 p. 15 of 27). Defendant alleges that the survey was conducted between late 1995 and 1997 and that nearly all closed auto claim files were eligible [*5] as long as the total indemnity payout was less than $250,000.000 and the file was "completely closed at the time of selection." (Docket no. 9 p. 16). Defendant argues that Plaintiff's file did not meet either requirement: Plaintiff's claim was never a closed claim and it has exceeded payments of $250,000. Plaintiff does not dispute either fact.

Plaintiff argues that the ACE documents are relevant to Plaintiff's claims including those relating to the handling of Plaintiff's claims and any defense that Defendant did not receive reasonable proof of the fact of Plaintiff's insurance claim and they are related to adjusting practices, reasons for denial and the decision making process. The Court agrees and finds that the documents are relevant and the scope of Plaintiff's request is limited. *Fed. R. Civ. P. 26(b)(1)*; *see also Morales v. State Farm Mut. Auto Ins. Co., 279 Mich. App. 720, 761 N.W.2d 454, 461 (Mich. App. 2008)* (claims-handling evidence was "relevant to facts that were of consequence to the action, whether plaintiff provided defendant reasonable proof of the fact and amount of the loss sustained for purpose of penalty interest under *MCL 500.3142(2)*" and relevant to "whether plaintiff's claim was [*6] denied because it was not causally related to the accident (defendant's position) or because it was a valid claim that was not handled fairly (plaintiff's theory).")

Defendant also argues that the documents are subject to the self-evaluative privilege and should be protected from disclosure pursuant to *Fed. R. Civ. P. 26(c)*. The Court finds that the ACE documents are not subject to the Insurers Compliance Self-Evaluative Audit Privilege, *Mich. Comp. Laws Ann. § 500.221*. *Section*

500.221(13)(d), Mich. Comp. Laws Ann., excepts from the privilege "[d]ocuments, communication, data, reports, memoranda, drawings, photographs, exhibits, computer records, maps, charts, graphs, and surveys kept or prepared in the ordinary course of business." The Court finds instructive *Crump v. State Farm Mutual Automobile Ins. Co., 2005 Mich. App. LEXIS 3043, 2005 WL 3303978, Docket no. 256558, n.2. (Mich. App. Dec. 6, 2005)*, in which the Michigan Court of Appeals noted in *dictum* that although the trial court had found that the ACE documents were privileged, the ACE documents appeared to have been created

> [D]uring an internal review of State Farm's catastrophic claims handling procedures for purely business reasons: to improve employee [*7] efficiency and cost effectiveness. These documents do not appear to fall within the plain requirements of the self-evaluative privilege, *MCL 500.221*, which applies to documents prepared 'for the purpose of identifying or preventing noncompliance with laws, regulations, orders or industry or professional standards.'

Crump, 2005 Mich. App. LEXIS 3043, 2005 WL 3303978 n.2; *see also Van Emon v. State Farm Mutual Automobile Ins., Co., 2008 U.S. Dist. LEXIS 5042, 2008 WL 205243 (E.D. Mich. Jan. 24, 2008)* ("whether or not the ACE initiatives were applied to Plaintiff's case is a proper subject of discovery").

Defendant makes the general allegation that these records, if disclosed to the general public, "may result in annoyance to State Farm, oppression, undue burden or expense by revealing proprietary information, trade secrets or confidential research, development or commercial information not available to the general public including Defendant's competitors." (Docket no. 9 p. 20 of 27). Defendant also argues it its Reply that the documents "are clearly of a corporate nature, and involve the review of other individuals claims (closed files)." Defendant's statements mostly parrot *Rule 26(c), Fed. R Civ. P.*, and Defendant fails to support these speculative [*8] allegations with facts or otherwise show the good cause required for a protective order to issue. Defendant also argues that Plaintiff should not be allowed to use these materials in other cases. Defendant fails to show or allege the "clearly defined and serious" injury necessary for a protective order to issue in this instance. The Court will deny Defendant's Motion To Compel with respect to the twenty-one ACE documents identified in Plaintiff's Re-Notice of Deposition.

2. Institutional Training Documents

Plaintiff's Notice of Deposition paragraph No. 3 asks for specific Auto Claim Manual Sections identified by BATES number and Claim Manual section title and also asks for "[a]ny and all memorandum, letters or documents of any kind that were issued by anyone at State Farm that relate in any way to the ACM guidelines relating to the use of reports prepared by doctors hired by State Farm in the State of Michigan and as testified to by Pat Parr-Armelagos in the trial of *Villaflor v. State Farm*, Case No. 07-13939." (Docket no. 9-2).

Plaintiff argues that the Auto Claim Manual sections are relevant for the same reasons the ACE documents are relevant. The Court agrees for the reasons set forth [*9] with respect to the ACE documents above. Similarly, Defendant has not alleged any reasons for seeking a protective order for this material other than relevance and has not met the good cause requirement as set forth above with respect to the ACE documents. The Court will deny Defendant's Motion (docket no. 9) as to this request.

3. Data Regarding Attendant Care Rate For All Claims

Plaintiff's Re-Notice of Taking Video Deposition *Duces Tecum*, paragraph no. 4 asks Parr-Armelagos to produce at her deposition "[a]ny and all documents or data utilized by State Farm to determine the value of attendant care whether or not utilized in this claim including ***all underlying data*** in support of the documents utilized." (Docket no. 9-2). The Court finds the information sought is relevant in part yet the request is overly broad as to "all claims" without any limitations to claims similar to Plaintiff's. *Fed. R. Civ. P. 26(b)(1)*. The Court will grant Defendant's motion in part and Defendant shall produce any and all documents or data utilized by State Farm at any time to determine the value of attendant care benefits *in this claim* including underlying supporting data in support of the documents utilized. [*10] Production of the utilized documents will be in full and not limited to only those sections or portions of a document selected for *this claim.* Defendant has not shown good cause to produce this information pursuant to a protective order.

4. Ms. Parr-Armelagos's Laptop Computer

Plaintiff's Re-Notice of Taking Video Deposition *Duces Tecum*, paragraph no. 5 asks Ms. Parr-Armelagos to produce her "State Farm laptop computer to allow for access to State Farm databases, intranet pages and other documents and data electronically stored by State Farm." (Docket no. 9-2). Plaintiff's argument that the laptop is necessary relies on allegations that these parties do not operate with a clean slate between them and that Defendant's "conduct in prior litigation between the parties cannot be ignored." (Docket no. 12 p. 15 of 25). Plaintiff also argues that "in the last claim this supervisor put a 'lock' on the claim preventing State Farm personnel from utilizing the adjuster log notes" and that it is unknown if the lock remains, whether State Farm personnel have been prevented from using the log notes and "raises questions regarding the integrity of the claim file." (Docket no. 12 p. 15 of 25). Plaintiff [*11] also questions the integrity of the ACE documents. Plaintiff argues that with the laptop "if additional documents are mentioned or available to those persons making decisions on the claim then they can be reviewed by State Farm's counsel and either produced or minimally, identified and the proper objection raised."

Given the contentious history between the parties and the laundry list of discovery motions pending before this Court, the Court is without the depth of imagination and unbridled optimism necessary to adopt Plaintiff's view that the laptop's presence at the deposition will result in the efficient and helpful production of a litany of documents heretofore neither identified nor requested. The more likely scenario is that real-time requests from Plaintiff to "print" and "produce" documents referenced during the deposition or requests to otherwise access the laptop would bring the deposition to a screeching halt. Without providing any further limiting scope, Plaintiff has not met the relevance standard set forth in *Fed. R. Civ. P. 26(b)(1)* to require the production of the laptop. Defendant's motion for protective order will be granted as to the laptop.

B. Plaintiff's Motion To [*12] **Compel Defendant Employee Pat Parr-Armelagos To Answer Depositions Questions (Docket no. 21) and Defendant's Motion To Terminate Deposition Pursuant To FRCP 30 (Docket no. 33)**

Plaintiff moves to continue the deposition of Pat Parr-Armelagos. (Docket no. 21). Plaintiff alleges that Defendant's counsel objected to a question at the deposition and terminated the deposition. Ms. Parr-Armelagos appeared for deposition on October 19, 2010 and her deposition was undertaken at that time. (Docket no. 21-2, 21-3). The issue is not whether Ms. Parr-Armelagos can be deposed or the sufficiency of the deposition notice. Although Defendant had pending at that time its Motion for Protective Order (docket no. 9), the subjects of that motion were the three document requests and the request for laptop addressed above.

Plaintiff alleges that he was asking Ms. Parr-Armelagos about "basic adjusting practices" and claims handling practices. As the Court determined above with respect to Defendant's Motion (docket no. 9), these issues are relevant to the claims and defenses in this action. The Court does not find persuasive Defendant's allegations that Ms. Parr-Armelagos had "limited to no involvement" in Plaintiff's [*13] claim. (Docket no. 32 p. 4 of 16). Plaintiff has shown that in at least one discovery response Ms. Parr-Armelagos was identified as a person who made or participated in a decision regarding the payment or denial of insurance benefits for Joseph Chauvin. (Docket no. 21 p. 9 of 16).

The Court will grant Plaintiff's motion in part and order the deposition of Ms. Parr-Armelagos to go forward, with Ms. Parr-Armelagos to answer the questions at issue in Plaintiff's Motion to Compel (docket no. 21) and continue the deposition to further address those topics set forth above to which the Court denied Defendant's Motion for Protective Order. (Docket no. 9). Plaintiff's request for sanctions will be denied without prejudice.

The Court has reviewed the deposition transcript and finds that Plaintiff's counsel's questioning was not in "bad faith or in a manner that annoys, embarrasses, or oppresses the opponent or party" and did not violate *Rule 30(d)(3)* or the Civility Principles (Administrative Order No. 08-AO-009). Defendant has mischaracterized what it terms as the repeated asking of questions, where, in fact, the deponent had not yet provided an answer to the question. *See, e.g.*, Parr-Armelagos [*14] Dep. p. 32, line 22-23. Some questions were asked more than once as Defendant's counsel provided objections to which Plaintiff's counsel responded, thus sidelining the actual answering of many of these questions. Further, Defendant has mischaracterized Plaintiff's questioning as to whether Defendant "abides by jury decisions," which was asked

initially in direct relation to Plaintiff's claim and prior trial. Testimony was developed with follow-up questions which the witness refused to answer. For these reasons, the Court will deny Defendant's Motion To Terminate Deposition Pursuant To *FRCP 30* (docket no. 33).

The Court will make no award of attorneys fees in these matters. *Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii)*.

IT IS THEREFORE ORDERED that Defendant's Motion For Protective Order As To The Deposition Duces Tecum Of Patricia Parr-Armelagos And Brief In Support (docket no. 9) is **GRANTED** in part as to the following:

> 1. Defendant shall produce within 21 days of entry of this Order documents identified and/or described in Plaintiff's Re-Notice of Taking Video Deposition *Duces Tecum* (docket no. 9-2) paragraph no. 4 but limited to those documents and data utilized in Plaintiff's claim, as set [*15] forth above; and
>
> 2. Plaintiff's request in Plaintiff's Re-Notice of Taking Video Deposition *Duces Tecum* (docket no. 9-2) paragraph no. 5 that Ms. Parr-Armelagos produce her laptop computer at the deposition is overly broad and not limited to relevant information and is therefore stricken. *Fed. R. Civ. P. 26(b), (c)*.

IT IS FURTHER ORDERED that the remainder of Defendant's Motion For Protective Order As To The Deposition Duces Tecum Of Patricia Parr-Armelagos And Brief In Support (docket no. 9) is **DENIED** and Defendant shall produce within 21 days of entry of this Order documents identified and/or described in Plaintiff's Re-Notice of Taking Video Deposition *Duces Tecum* (docket no. 9-2) paragraph nos. 2 and 3 as set forth above.

IT IS FURTHER ORDERED that Plaintiff's Motion To Compel Defendant Employee Pat Parr-Armelagos To Answer Depositions Questions (docket no. 21) is **GRANTED** in part and Ms. Parr-Armelagos's deposition will be continued and completed on a mutually convenient date within 30 days of entry of this order as set forth above.

IT IS FURTHER ORDERED that Plaintiff's request for sanctions in Plaintiff's Motion To Compel Defendant Employee Pat Parr-Armelagos To Answer Depositions [*16] Questions (docket no. 21) is **DENIED** without prejudice.

IT IS FURTHER ORDERED that Defendant's Motion To Terminate Deposition Pursuant to *FRCP 30* (docket no. 33) is **DENIED.**

NOTICE TO THE PARTIES

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

Dated: May 11, 2011

/s/ Mona K. Majzoub

MONA K. MAJZOUB

UNITED STATES MAGISTRATE JUDGE

Not Reported in F.Supp.2d, 2008 WL 3049982 (E.D.Mich.)
(Cite as: 2008 WL 3049982 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Southern Division.
Emanuel SOTO, Plaintiff,
v.
FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign corporation, Defendant.

No. 07-11959.
Aug. 1, 2008.

Andrew J. Black, Darren Findling, Findling Law Firm, Royal Oak, MI, for Plaintiffs.

Gregory M. Krause, Steven M. Ribiat, Butzel Long, Bloomfield Hills, MI, for Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO AMEND WITNESS LIST [DOCKET NO. 13] AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [DOCKET NO. 14]

DENISE PAGE HOOD, District Judge.

I. INTRODUCTION

***1** This matter is before the Court on Plaintiff Emanuel Soto's Motion to Amend/Correct Witness List [**Docket No. 13, filed September 10, 2007**] and Defendant's Motion for Partial Summary Judgment as to Counts I (Breach of Contract) and IV (Declaratory Relief) of Plaintiff's Complaint [**Docket No. 14, filed September 14, 2007**].

Defendant has also filed a Motion for Partial Summary Judgment as to Counts II and III, however, Plaintiff agreed to a Stipulation and Order dismissing those counts with prejudice on October 31, 2007. **[Docket No. 19].** Defendant's Motion to Enforce Judgment has also been withdrawn by defendant. **[Docket No. 26].**

II. STATEMENT OF FACTS

Plaintiff Emanuel Soto ("Soto") purchased real property located at 17208 Westmoreland, Detroit, Michigan from Yarith Calito for $160,000. *See* Warranty Deed, Defendant's Motion for Partial Summary Judgment, Exhibit 2. At closing, Soto obtained a title insurance policy from Defendant First American Title Insurance Company ("First American"), with a coverage limit of $160,000. *See* Exhibit 1, Defendant's Motion for Partial Summary Judgment.

The Title Insurance Policy contains the following provisions:

> § 6.b.(1): If (First American) remove(s) the cause of the claim with reasonable diligence after receiving notice of it, all (of First American's) obligations for the claim end, including any obligation for loss (Soto) had while (First American was) removing the cause of the claim."
>
> § 6.b.(2): Regardless of 6.b.(1) above, if (Soto) cannot use the (Westmoreland Property) because of a claim covered by this (Title Insurance Policy): (a) Soto may rent a reasonably equivalent substitute residence and (First American) will repay (Soto) for the actual rent (Soto) pay(s) ...; (b) (First American) will pay reasonable costs (Soto) pay(s) to relocate any personal property ... and repair of any damage to that personal property because of the relocation." *Id.*, § 6.b.(2).

After Soto acquired the Westmoreland Property, he became a party to a lawsuit in the Wayne County Circuit Court (Case No. 04-421597-CH) (Hon. Isidore B. Torres, presiding) concerning issues with a predecessor in his chain of title. The Quiet title Action resulted in a determination that Soto did not possess fee simple title to the Westmoreland property, and that the property was owned by Sprigs Peoples. Soto sought coverage under the Title Insurance Policy because of the ownership interest claimed by Sprigs Peoples. *See* Soto's Deposition, page 53, line 25.

To attempt to clear the defect in Title, First American then purchased the Westmoreland property from Sprigs Peoples. There is a dispute over whether First American then vested Soto with a covenant deed, or a fee simple interest. Defendant claims that First American has cured the title defect and Soto now owns the property he purchased, free and clear of any adverse claims against his title.

Soto states in his reply brief that on June 8, 2006, and recorded on June 28, 2006, the Wayne County Sheriff executed a Sheriffs Deed on the property, effectively transferring interest in the property to U.S. Bank, N.A., as Trustee. *See* Exhibit G, Plaintiff's Reply Brief. Counsel for Defendant unsuccessfully defended Plaintiff in the quiet title action and on July 6, 2006, a Consent Judgment was entered declaring Spriggs Peoples the fee simple owner of the property. Following the foreclosure of Plaintiff's mortgage and after losing ownership of the Property to Sprigs People, Defendant purchased the property from Sprigs Peoples for approximately $100,000 and conveyed it to Plaintiff.

***2** Soto filed the instant action claiming that First American breached the Title Insurance Policy by clearing the Westmoreland Property's defective title rather than paying him $160,000.

III. APPLICABLE LAW & ANALYSIS

I. Motion to Amend Witness List

Plaintiff Soto seeks the approval of this Court to amend his Witness List in order to add experts to assess the value of and damages to the subject property. Plaintiff claims that "a key issue in this case concerns the value of and damages to the subject property." Plaintiff also seeks an extension of discovery to allow Defendant the opportunity to depose the added expert witnesses.

Defendant opposes Plaintiff's Motion, claiming that the motion should be denied because it is devoid of the showing of good cause necessary for the Court to modify its July 3, 2007 Scheduling Order.

"The party seeking relief from a case management order must make a showing of good cause, demonstrating why the requirements of the order cannot reasonably be met despite the diligence of the party seeking the extension." *Clark v. Muskegon Police Officers Corey Luker*, 2007 U.S. Dist. LEXIS 31400, 3, 2007 WL 1295996 (W.D.Mich.2007); *see Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir.2003). Soto's Motion was not filed until after discovery closed, and he offered no evidence of any diligence in attempting to meet the deadline for naming the witnesses. Further, First American claims that it would suffer undue prejudice if this Court were to grant Soto's motion, claiming increased costs if the case were to be reopened.

Soto has not supported his Motion with the necessary showing of good cause, and therefore the Motion to Amend/Correct the Witness list is DENIED.

II. Motion for Summary Judgment for counts I and IV

Due to the foreclosure, Plaintiff has been stripped of his interest and possession of the Property. To date, Plaintiff's interest and possession of property have yet to be restored. Compl. at ¶ 23. Defendant's vesting the fee simple interest to Plaintiff does not vest title to Plaintiff, and only had the effect of vesting title to the purchaser at the foreclosure sale. Pl. Response to Mot. For Summary Judgment, Exh. 8.

Inherent in fee simple ownership is the right to quiet enjoyment and possession. *Sullivan v. U.S.*, 461 F.Supp. 1040, (W.D.Pa.1978). Defendant did not provide Plaintiff with possession for several months, the result of which ended in the property falling into foreclosure. It was foreseeable that the Property would go into foreclosure, and Plaintiff alleges that Defendant delayed curing the defect in title to secure a more desirable purchase price. (Pl.

Response to Mot. for Summary Judgment at 8). "[T]he general rule in breach of contract actions is that damages recoverable for a breach of contract are those arising naturally from the breach or those which were within the parties' contemplation at the time of contracting." *Kewin v. Massachusetts Mutual Life Ins. Co.*, 408 Mich. 401 (1980). Plaintiff has presented a question of fact as to whether the house falling to foreclosure arose naturally from Defendant's delay in curing the breach, and damages relating to the foreclosure are recoverable under *Kewin.*

***3** Because Defendant's actions to cure the title defect may have been too little too late, and did not make Plaintiff whole, Defendant is not entitled to Summary Judgment on Counts I and IV, and their Motion for Partial Summary Judgment is DENIED.

Defendant also claims that Plaintiff's declaratory relief count is duplicative of the breach of contract claim. Under Michigan law, however, Plaintiff is entitled to plead alternative theories of liability. *Jones v. Porretta,* 428 Mich. 132, 150, 405 N.W.2d 863 (1987).

IV. CONCLUSION

Accordingly,

IT IS ORDERED that Plaintiff Emanuel Soto's Motion to Amend/Correct Witness List [**Docket No. 13, filed September 10, 2007**] is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Partial Summary Judgment as to Counts I (Breach of Contract) and IV (Declaratory Relief) of Plaintiff's Complaint [**Docket No. 14, filed September 14, 2007**] is DENIED.

E.D.Mich.,2008.
Soto v. First American Title Ins. Co.
Not Reported in F.Supp.2d, 2008 WL 3049982 (E.D.Mich.)

END OF DOCUMENT

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

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

INDEX OF EXHIBITS TO PLAINTIFFS UNITED STATES OF AMERICA'S AND STATE OF MICHIGAN'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S "OMNIBUS" MOTION FOR A 90-DAY STAY OF DEPOSITIONS

1. Blue Cross Blue Shield of Michigan [DRAFT] Case Management Order (August 18, 2011)

2. Letter from Ashley Cummings, Hunton & Williams, to Amy Fitzpatrick, U.S. Dept. of Justice (February 7, 2012)

3. Blue Cross Blue Shield of Michigan Markup of [PROPOSED] Case-Management Order (February 17, 2012)

4. E-mail from Steven Kramer, U.S. Dept. of Justice, to Jack Martin, Hunton & Williams (10:16 A.M., February 27, 2012)

5. E-mail from Jack Martin, Hunton & Williams, to Lance Young, Sommers Schwartz, P.C, and Jason Thompson, Sommers Schwartz, P.C (February 26, 2012)

6. Letter from Steven Kramer, U.S. Dept. of Justice, to Todd Stenerson, Hunton & Williams (February 18, 2011)

7. Letter from Steven Kramer, U.S. Dept. of Justice, to Todd Stenerson, Hunton & Williams (April 6, 2011)

8. E-mail from Joshua Lipton, Gibson, Dunn & Crutcher, to Jack Martin, Hunton & Williams (February 26, 2012)

9. Letter from Jonathan Lasken, Hunton & Williams, to Amy Fitzpatrick, U.S. Dept. of Justice (March 5, 2012)

10. E-mail from Joshua Lipton, Gibson, Dunn & Crutcher, to Jonathan Lasken, Hunton & Williams (March 7, 2012)

11. Unpublished Opinions