

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

THE SHANE GROUP, INC. et al.	)	
	)	
Plaintiffs, on behalf of themselves	)	
and all others similarly situated	)	Case No. 2:10-cv-14360-DPH-MKM
	)	
v.	)	Judge Denise Page Hood
	)	Magistrate Judge Mona K. Majzoub
BLUE CROSS BLUE SHIELD	)	
OF MICHIGAN,	)	
	)	
Defendant.	)	

**NOTICE OF FILING PUBLIC VERSION OF  
BLUE CROSS BLUE SHIELD OF MICHIGAN’S OPPOSITION TO  
PLAINTIFFS’ MOTION TO ADD AND DROP NAMED  
PLAINTIFFS FOR THE PROPOSED CLASS [DKT. #127]**

On October 11, 2016, pursuant to the Court’s August 25, 2016 Scheduling Order [Dkt. #262], the Parties filed a Notice of Documents Previously Filed Under Seal Agreed to Be Unsealed [Dkt. #266] and updated that Notice on October 14, 2016 [Dkt. #273]. Defendant Blue Cross Blue Shield of Michigan (BCBSM) now files full versions of briefs previously filed under seal, making public the portions of those documents that the Parties and Third Parties have agreed they will not move to seal, along with public copies of the corresponding exhibits as listed in Exhibit 1 to the October 14, 2016 Notice. Attached hereto as Exhibit 1 is Blue

Cross Blue Shield of Michigan's Opposition to Plaintiffs' Motion to Add and Drop  
Named Plaintiffs for the Proposed Class [Dkt. #127] and corresponding exhibits.

This 14th day of October 2016.

/s/ Todd M. Stenerson

Todd M. Stenerson (P51953)  
D. Bruce Hoffman  
(Adm. E.D. MI, DC Bar 495385)  
Neil K. Gilman  
(Adm. E.D. MI, DC Bar 449226)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave, N.W.  
Washington, D.C. 20037  
(202) 955-1500  
tstenerson@hunton.com  
bhoffman@hunton.com  
ngilman@hunton.com

Thomas Van Dusen (P30602)  
Jason R. Gourley (P69065)  
Thomas Rheume, Jr. (P74422)  
BODMAN PLC  
6th Floor at Ford Field  
1901 St. Antoine Street  
Detroit, Michigan 48226  
(313) 259-7777  
tvandusen@bodmanlaw.com

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

*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2016 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all parties of record. I further certify that I have caused the foregoing document to be sent by email or U.S. Mail to all individuals or entities who filed objections to the previous Settlement Agreement or, for those individuals or entities represented by counsel, their counsel.

/s/ Todd M. Stenerson  
Todd M. Stenerson  
2200 Pennsylvania Ave, N.W.  
Washington, D.C. 20037  
(202) 955-1500  
tstenerson@hunton.com

October 14, 2016

*Attorney for Defendant*

# EXHIBIT 1

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

THE SHANE GROUP, INC. et al.	)	
	)	
Plaintiffs, on behalf of themselves	)	
and all others similarly situated	)	Case No. 2:10-cv-14360-DPH-MKM
	)	
v.	)	Judge Denise Page Hood
	)	Magistrate Judge Mona K. Majzoub
BLUE CROSS BLUE SHIELD	)	
OF MICHIGAN,	)	
	)	
Defendant.	)	

**BLUE CROSS BLUE SHIELD OF MICHIGAN’S  
OPPOSITION TO PLAINTIFFS’ MOTION TO ADD  
AND DROP NAMED PLAINTIFFS FOR THE PROPOSED CLASS**

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

Alan N. Harris (P56324)  
G. Christopher Bernard (P57939)  
Jason R. Gourley (P69065)  
Rebecca D. O’Reilly (P70645)  
Carl Rashid (P66064)  
BODMAN PLC  
201 South Division St., Suite 400  
Ann Arbor, MI 48104  
734-930-2482

Todd M. Stenerson (P51953)  
D. Bruce Hoffman (Adm. E.D. MI)  
Neil K. Gilman (Adm. E.D. MI)  
David A. Higbee (Adm. E.D. MI)  
Ashley Cummings (Adm. E.D. MI)  
Jonathan H. Lasken (Adm. E.D. MI)  
HUNTON & WILLIAMS LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
202-955-1500  
tstenerson@hunton.com

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

## STATEMENT OF ISSUES PRESENTED

1. Neither Rules 15 or 21 expressly allow the addition of a new plaintiff without an amended complaint. Rule 8 provides that a claim be set forth in a pleading that contains a short and plain statement of facts showing a right to relief. Should Plaintiffs be permitted to add two new named plaintiffs without an amended complaint?
2. Plaintiffs have admitted that they intend to narrow the proposed class definition, but claim that they cannot tell Blue Cross what the new definition will be until after their expert has determined at which hospitals the MFN did or did not have an impact. Having determined that the existing allegations and class definition will therefore change, can any new plaintiffs proceed under the existing Complaint without amending allegations now known to be incorrect?
3. Plaintiffs assured the Court that all six plaintiffs had sufficiently alleged that they paid a hospital with an MFN and had been injured by paying too much. Plaintiffs now seek to drop five of those six, admitting that two never even paid a hospital and that three others may not have paid too much. Should those five plaintiffs be dismissed with prejudice and Blue Cross be awarded the costs it needlessly incurred reviewing those plaintiffs' documents?

## TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF MOST CONTROLLING OR APPROPRIATE AUTHORITY.v	
I. INTRODUCTION .....	1
II. BACKGROUND .....	3
III. ARGUMENT.....	8
A. The Court Should Deny The Motion To Add Two Named Plaintiffs ..8	
1. Plaintiffs may not add new parties without amending the Complaint.....	9
2. Allowing the addition of two new named plaintiffs without an amended complaint would unduly prejudice Blue Cross .....	11
3. Plaintiffs have missed the deadline for filing an amended complaint.....	16
B. The Just Terms for Dismissing Five Named Plaintiffs Include an Award of Costs and a Dismissal With Prejudice .....	16
1. Plaintiffs knew or should have known that neither Steele nor Shane Group ever paid an MFN hospital even before their Complaint was filed .....	17
2. Plaintiffs knew or should have known that the other named plaintiffs were not putative class members.....	20
3. Blue Cross has incurred significant discovery costs relating to the claims of the five plaintiffs now sought to be dismissed....	21
C. The Remaining Plaintiff, Carpenters, Cannot Proceed Without Moving for Leave to Amend the Complaint Out of Time to Address Plaintiffs’ Admissions .....	22
IV. CONCLUSION.....	24

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Adobe Lumber, Inc. v. Hellman</i> , 2010 WL 760826 (E.D. Cal. Mar. 4, 2010).....	9
<i>B &amp; H Medical, LLC v. ABP Admin., Inc.</i> , 354 F. Supp.2d 746 (E.D. Mich. 2005) .....	3, 23
<i>Brooks v. Township of Clinton</i> , 2013 WL 812097 (E.D. Mich. March 5, 3013) .....	9
<i>Broyles v. Correctional Medical Services, Inc.</i> , 2009 WL 3154241 (6th Cir. Jan. 23, 2009).....	8
<i>Commercial Money Center, Inc. v. Illinois Union Ins. Co.</i> , 508 F.3d 327 (6th Cir. 2007) .....	9
<i>Crown, Cork, &amp; Seal Co., Inc. v. Parker</i> , 462 U.S. 345 (1983).....	15
<i>Dura Global Technologies, Inc. v. Magna Donnelly Corp.</i> , 2011 WL 4532875 (E.D. Mich. Sept. 30, 2011) .....	8, 10
<i>In re Vertrue Inc. Mktg. &amp; Sales Practices Litig.</i> , No. 10-3928, 2013 WL 1607295 (6th Cir. Apr. 16, 2013).....	15
<i>Jaimes v. Toledo Metro. Housing Auth.</i> , 758 F.2d 1086 (6th Cir. 1985) .....	11
<i>Jarrett v. Kassel</i> , 972 F.2d 1415 (6th Cir. 1992) .....	15
<i>Morrow v. City of Tenaha</i> , 2010 WL 2721400 (E.D. Tex. July 8, 2010) .....	14
<i>Rosen v. Tenn. Com’r. of Fin. &amp; Admin.</i> , 288 F.3d 918 (6th Cir. 2002) .....	10, 11
<i>Rutledge v. Town of Chatham</i> , 2010 WL 3835662 (W.D. Va. Sept. 30, 2010).....	9



*Thorn v. Bob Evans Farms, LLC*,  
2013 WL 2456336 (S.D. Ohio June 6, 2013).....10

*Young Soon Kim v. TD Ameritrade, Inc.*,  
891 F. Supp.2d 936 (N.D. Ill 2012).....9

**Statutes and Rules**

Fed. R. Civ. P. 8 .....9, 10

Fed. R. Civ. P. 11 .....2, 3, 23, 24

Fed. R. Civ. P. 15 .....8

Fed. R. Civ. P. 21 .....8, 9, 10

**STATEMENT OF MOST CONTROLLING OR APPROPRIATE  
AUTHORITY**

*Adobe Lumber, Inc. v. Hellman*, 2010 WL 760826 (E.D. Cal. Mar. 4, 2010)

*B & H Medical, LLC v. ABP Admin., Inc.*, 354 F. Supp.2d 746 (E.D. Mich. 2005)

*Dura Global Technologies, Inc. v. Magna Donnelly Corp.*, 2011 WL 4532875 (E.D. Mich. Sept. 30, 2011)

*Rutledge v. Town of Chatham*, 2010 WL 3835662 (W.D. Va. Sept. 30, 2010)

*Thorn v. Bob Evans Farms, LLC*, 2013 WL 2456336 (S.D. Ohio June 6, 2013)

*Young Soon Kim v. TD Ameritrade, Inc.*, 891 F. Supp.2d 936 (N.D. Ill 2012)

Fed. R. Civ. P. 8

Fed. R. Civ. P. 11

Fed. R. Civ. P. 15

Fed. R. Civ. P. 21

## **I. INTRODUCTION**

The Court allowed Plaintiffs until June 17, 2013 to amend their Complaint. On that date, Plaintiffs neither sought to amend the Complaint nor filed a proposed amended Complaint. Rather, Plaintiffs filed a motion to add two new named plaintiffs (without adding any corresponding allegations about those individuals to the complaint) and drop five of the six current Plaintiffs because two of them are not even in the class and three others have little chance of prevailing on the merits.

In their motion, and in the discussions with Blue Cross leading up to the filing of the motion, Plaintiffs make several key concessions. First, they acknowledge that the factual allegations in the currently operative Complaint cannot be supported by the extensive factual record that has been developed in this case. Indeed, as just one example, Plaintiffs' allegation that "MFN-plus" clauses caused higher prices was expressly contradicted by senior executives at each of the hospitals that had those clauses in their contract with Blue Cross, all of whom testified that those clauses had no effect. Second, Plaintiffs concede that the broad class definition proposed in the Complaint and on which this case has been proceeding is not the class for which certification will be sought. Rather, Plaintiffs have said that they will proceed on a much narrower proposed class definition, but refuse to tell Blue Cross what class it potentially faces.

Plaintiffs' failure to file an amended complaint by the Court-ordered deadline appears to be a strategic attempt to avoid alerting the Court to the problems with their case and to keep Blue Cross guessing as to what theories Plaintiffs will ultimately seek to pursue. This is wholly improper and should be rejected by the Court. Rather, in response to Plaintiffs' motion, Blue Cross requests that the Court:

(1) Deny the request to add two new named plaintiffs. The addition of named plaintiffs requires an amended complaint, at the very least to make allegations demonstrating the new plaintiffs' individual right to recovery. Because Plaintiffs have failed to meet the Court's deadline for seeking to amend the complaint, the two new plaintiffs cannot be added.

(2) Allow the voluntary dismissal of the five named plaintiffs seeking such a dismissal, but award costs to Blue Cross because Plaintiffs knowingly required Blue Cross to undertake expensive discovery of these named plaintiffs. In addition, any dismissal should be with prejudice.

Moreover, in light of the Plaintiffs' admissions, the lone remaining named plaintiff, Carpenters, cannot continue litigating without seeking to amend the Complaint so that it includes only facts that can be pled in good faith, as well as a class definition that can be proposed in good faith. As the courts in this Circuit have held, Rule 11's "requirement of reasonableness is not a one-time obligation.

Rather, each party is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11.”<sup>1</sup> This is particularly true at this watershed moment in the litigation, where Plaintiffs have admitted that they no longer wish to pursue—because they can’t support them or it’s not worth the money and effort to do so—many of the allegations in their Complaint. To allow the remaining named plaintiff to proceed under the existing Complaint would prejudice Blue Cross by forcing it to proceed blindly as to Plaintiff’s actual claims and not allowing it to focus its remaining discovery efforts.

## II. BACKGROUND

Plaintiffs filed their original complaints between October 2010 and January 2011. After participating in discovery, Plaintiffs filed their Consolidated Amended Complaint in June 2012. Blue Cross moved to dismiss that Complaint, arguing, among other things, that the allegations that each named plaintiff was a member of the proposed class and had a sufficient basis to claim injury-in-fact were conclusory.<sup>2</sup> Blue Cross was particularly concerned about undertaking costly discovery relating to individuals who may or may not have been members of the

---

<sup>1</sup> *B & H Medical, LLC v. ABP Admin., Inc.*, 354 F. Supp.2d 746 (E.D. Mich. 2005) (citing *Runfolo & Assoc., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 374 (6th Cir. 1996) (internal citations and quotations omitted).

<sup>2</sup> See 07.20.2012 Motion to Dismiss, Dkt. No. 80, at 6-10.

class they sought to represent, which was one of the underlying concerns of the Supreme Court's *Twombly* decision.

Plaintiffs argued vociferously that nothing more than the bare allegations in the Complaint were required. Moreover, they suggested to the Court that the allegations Blue Cross argued were required were implicit from the language of the Complaint, including the class definition. Thus, they claimed that each named plaintiff "directly paid a hospital in Michigan that had an MFN Agreement with Blue Cross" and, as a result of the MFN, paid higher prices for hospital services.<sup>3</sup>

With respect to Scott Steele, for example, Plaintiffs argued:

True enough, we could have said, for example with respect to my client, Scott Steele, we could have said Scott Steele went into the hospital in Flint, Michigan for an appendectomy, was driven there by his sister, who stayed three days, it was an unremarkable procedure, it cost \$2,900, he is doing well today and all of the other things, the types of information that Blue Cross suggests in their brief that we should have put in the Complaint, but *Twombly* doesn't require that.<sup>4</sup>

In mid-February 2013, however, Plaintiffs sought consent to dismiss Steele because they had determined that Steele was not, in fact, a member of the proposed class.<sup>5</sup> Seeing that its original concerns were warranted, Blue Cross asked

---

<sup>3</sup> See 10.09.2012 Oral Argument Tr. at 32.

<sup>4</sup> *Id.* at 33.

<sup>5</sup> See Ex. 1, Jan. 25, 2013 Johnson e-mail to Cummings; Ex. 2, Feb. 26, 2013 Hedlund e-mail to Cummings.

Plaintiffs to confirm that each remaining named plaintiff had a factual basis to assert that it directly paid for hospital services at a hospital that entered into a provider agreement with Blue Cross that included an MFN clause during the relevant period.<sup>6</sup> Plaintiffs refused.

It turns out that Plaintiffs' representations and arguments were wrong and Blue Cross's concerns were exactly correct, and as a result, at this late date, five of the six named plaintiffs seek a voluntary dismissal. Plaintiffs' motion acknowledges that two of the named plaintiffs (Steele and Shane Group) did not make any payments to an MFN hospital.<sup>7</sup> Three other named plaintiffs (Veneberg, Abatement Workers and Monroe Plumbers) seek voluntary dismissal because "attempting to proceed with any claims which those parties *might have* would simply not be feasible" because "the expert work required to properly analyze the data for impact and damages issues" would impose "significant burdens" on the class.<sup>8</sup>

As part of their motion, Plaintiffs now admit that "it may not be possible to prove damages at all the MFN hospitals"<sup>9</sup>—a statement directly contradicting the allegations in their Complaint and indicating that Plaintiffs have a new theory of

---

<sup>6</sup> See Ex. 3, April 26, 2013 Cummings e-mail to Johnson.

<sup>7</sup> Pls. Br. at 4.

<sup>8</sup> Pls. Br. at 4-5 (emphasis added).

<sup>9</sup> Pls. Br. at 2.

how MFNs affected the currently defined class. This is not surprising given the hospital testimony described above.<sup>10</sup> Indeed, Plaintiffs essentially acknowledge that the allegations will change, but claim that they do not want to “waste the class’s resources [to] update our allegations now,” and that they expect that their “expert’s analysis will provide a factual basis in the record” to support the claim that MFN-plus clauses “caused reimbursement rates *at some hospitals* to be higher.”<sup>11</sup>

In addition, Plaintiffs will ultimately seek certification of a class that differs in material respects from the proposed class defined in the Complaint. In fact, Plaintiffs have already told Blue Cross that they would do this, stating that they intend to narrow the class definition to exclude some members of the current putative class based upon their expert’s analysis of where “the MFN agreements did and did not have an impact.”<sup>12</sup> Plaintiffs have not told Blue Cross when they will disclose this new proposed class, suggesting that they may not do so until they file their class certification motion, after class discovery has closed.<sup>13</sup> As should be obvious, Blue Cross cannot properly prepare its defenses without being told

---

<sup>10</sup> See also Ex. 4, June 12, 2013 Stenerson letter to Small at 2 (urging Plaintiffs to file an amended complaint without “allegations that Plaintiffs know to be incorrect and lacking any factual basis”).

<sup>11</sup> See Ex. 5, June 13, 2013 Small letter to Stenerson at 3 (emphasis added).

<sup>12</sup> See Ex. 5, June 13, 2013 Small letter to Stenerson at 2.

<sup>13</sup> See Ex. 5, June 13, 2013 Small letter to Stenerson at 2.



which MFNs are being challenged. Plaintiffs are attempting to gerrymander their allegations and prevent their disclosure until months after the completion of fact discovery.

Finally, Plaintiffs seek to add two new named plaintiffs, Anne Patrice Noah and Susan L. Baynard, as putative class representatives. According to Plaintiffs, both of these individuals directly paid Paul Oliver Memorial Hospital for healthcare services under that hospital's applicable provider agreement with Blue Cross, that agreement contained an MFN clause, and both were injured because they paid artificially inflated prices for the services received.<sup>14</sup> This is no different than what Plaintiffs alleged with respect to the named plaintiffs they now wish to drop.<sup>15</sup> Plaintiffs say nothing about these individuals that would distinguish them from Steele, for example, whom Plaintiffs have now concluded was not in fact harmed because although he received treatment at a hospital with a Blue Cross MFN, "Steele had already reached his deductible" based on services he purchased at a different hospital.<sup>16</sup>

More importantly, while making these assertions about the new proposed named plaintiffs in their brief, Plaintiffs refuse to put any new allegations into a Complaint, where they belong. Rather, Plaintiffs propose that for the purposes of

---

<sup>14</sup> Pls. Br. at 11.

<sup>15</sup> *See, e.g.*, Consolidated Amended Complaint ¶ 19-24.

<sup>16</sup> Pls. Br. at 4.

completing class discovery these two individuals will proceed under the allegations in the current Consolidated Amended Complaint, which are now known to be inaccurate. While Plaintiffs have suggested that proceeding this way is “efficient,” the actual reason appears to be to avoid putting forward a Complaint that contains only those allegations that can be made in good faith. Plaintiffs clearly recognize that such a Complaint would demonstrate to the Court the fundamental weakness of this case.

### III. ARGUMENT

#### A. The Court Should Deny The Motion To Add Two Named Plaintiffs

Federal Rules of Civil Procedure 15 and 21 govern the amendment of pleadings and the addition or removal of parties. Under Rule 15(a)(2), if a responsive pleading has been served, as is the case here, a party may amend its complaint only with the opposing party’s consent or leave of court, the latter of which shall be freely given “when justice so requires.” Likewise, Rule 21 permits the court, either on its own or upon a motion, to “add or drop a party” “on just terms.” Courts in this district have held that the standards for amending a complaint or adding or deleting parties are the same under either Rule.<sup>17</sup>

---

<sup>17</sup> See, e.g., *Dura Global Technologies, Inc. v. Magna Donnelly Corp.*, 2011 WL 4532875 at \*2 (E.D. Mich. Sept. 30, 2011) (“the standards for adding parties are the same under both Rule 15 and Rule 21 because the plaintiff is required to obtain leave of court under both Rules.”). See also *Broyles v. Correctional Medical Services, Inc.*, 2009 WL 3154241 (6th Cir. Jan. 23, 2009) (“[t]his Circuit

Litigants are not automatically entitled to change parties. A court may deny such a request based on “unreasonable delay, lack of notice, bad faith, repeated failure to cure deficiencies by previous amendments, undue prejudice, or futility.”<sup>18</sup> Moreover, the liberal standard for amendment is not intended to allow a party to “get a new bite at the apple” after the initial theory of liability fails.<sup>19</sup>

### **1. Plaintiffs may not add new parties without amending the Complaint**

Plaintiffs argue that Rule 21 permits a party to add a plaintiff to a case “by motion” without actually amending the complaint.<sup>20</sup> This cannot be right.

The law is clear that a plaintiff cannot add a new defendant or a new claim by way of a brief or motion, but must instead do so only through an amended complaint.<sup>21</sup> The same principle—that an amended complaint must be submitted

---

has not determined whether Rule 21 or Rule 15 controls the amendment of a pleading where the amendment seeks to add parties to the action.”).

<sup>18</sup> *Brooks v. Township of Clinton*, 2013 WL 812097, at \* 2 (E.D. Mich. March 5, 2013) (Majzoub, M.J.).

<sup>19</sup> *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 346 (6th Cir. 2007).

<sup>20</sup> See Pls. Br. at 6, Heading II.a.

<sup>21</sup> See *Young Soon Kim v. TD Ameritrade, Inc.*, 891 F. Supp.2d 936, 940 (N.D. Ill 2012) (rejecting attempt to add new claims in a brief responding to a motion to dismiss, explaining that plaintiffs “may not add additional counts to their complaint without actually amending the complaint.”); *Adobe Lumber, Inc. v. Hellman*, 2010 WL 760826 at \*5 (E.D. Cal. Mar. 4, 2010) (plaintiff may not “simply add facts as discovery goes along without amending the complaint because to do so would read the fair notice requirement out of Rule 8”); *Rutledge v. Town of Chatham*, 2010 WL 3835662 at \*3 (W.D. Va. Sept. 30, 2010) (“Plaintiff cannot

that contains factual allegations showing a right to relief with respect to the new party or new claim—is equally applicable to adding a new plaintiff.<sup>22</sup> Indeed, Rule 8(a) explicitly sets out how any plaintiff states a “claim for relief”—that is, through “a pleading” that contains “a short and plain statement of the claim showing that the pleader is entitled to relief.”

An amended complaint is necessary to add a plaintiff because the new plaintiff must plead facts showing that they are entitled to relief.<sup>23</sup> This can only be done by making specific allegations that set out facts about the new plaintiff and

---

add a Defendant without amending his Complaint,” noting that the existing complaint does not “allege any claims or facts against” a purported new defendant identified “for the first time in a brief”).

<sup>22</sup> Plaintiffs do not cite, and Blue Cross was unable to locate, a single case addressing a claim that a plaintiff can be added without an amended complaint. However, if new claims or a new defendant cannot be added without an amended complaint, the same principle holds for a new plaintiff for the same reasons.

<sup>23</sup> See, e.g., *Thorn v. Bob Evans Farms, LLC*, 2013 WL 2456336, at \*2 (S.D. Ohio June 6, 2013) (granting request for leave to substitute a new party as the named plaintiff that was “made pursuant to Rule 21” while also requiring that the complaint be amended to change the parties); *Dura Global Technologies*, 2011 WL 4532875, at \*5 (granting plaintiff’s motion to add additional defendants and ordering plaintiff to “file an amended Complaint” that would “set forth well pled facts establishing a plausible right to recovery against the additional [defendants]”).

his or her alleged injury.<sup>24</sup> It is not sufficient for a named plaintiff to assert injury suffered by other members of the proposed class (or other named plaintiffs).<sup>25</sup>

**2. Allowing the addition of two new named plaintiffs without an amended complaint would unduly prejudice Blue Cross**

Putting aside the need to amend the Complaint to include allegations about the new plaintiffs, an amended complaint is required here because Plaintiffs have made clear that they are abandoning their prior theory of broad liability and their proposed class definition. Allowing them to do so, but at the same time allowing them to avoid telling the Court and Blue Cross what their actual theory is, will unduly prejudice Blue Cross for at least four reasons.

First, Plaintiffs admit that the broad allegations in the current Complaint cannot be supported. This is a significant admission, but Plaintiffs had no choice. In particular, the key allegation that the MFN-plus agreements harmed competition (Compl. ¶ 20) has proven false. Executives from hospitals (or hospital systems)

---

<sup>24</sup> See *Rosen v. Tenn. Com'r. of Fin. & Admin.*, 288 F.3d 918, 929-30 (6th Cir. 2002) (review of plaintiffs' amended complaint reveals that "nowhere in these filings do the named plaintiffs claim that the [challenged conduct] will affect them") (emphasis in original); *Jaimes v. Toledo Metro. Housing Auth.*, 758 F.2d 1086, 1093 (6th Cir. 1985) ("Each plaintiff must be analyzed in the context of each alleged violation in order to determine whether he or she personally suffered some actual or threatened injury.").

<sup>25</sup> *Rosen*, 288 F.3d at 928 ("class representatives without personal standing cannot predicate standing on injuries suffered by members of the class but which they themselves have not or will not suffer") (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants"))).

that agreed to an MFN-plus clause all testified unequivocally that the MFN-plus agreements did not cause the hospitals to raise the rates charged to any competitor for hospital services,<sup>26</sup> did not cause the hospitals to refuse to lower any competitor's rates,<sup>27</sup> did not result in any hospital terminating any competitor's contract with that hospital,<sup>28</sup> and did not cause any hospital to refuse to contract

<sup>26</sup>

[REDACTED] Ex. 7, Smith Dep. (Ascension, Nov. 14, 2012) at 160:23-161:7; Ex. 8, Felbinger Dep. (Ascension/Borgess, Aug. 29, 2012) at 354:5-9, 231:2-232:4, 232:23-233:5 [REDACTED]

Ex. 10, Johnson Dep.

[REDACTED] Oct. 30, 2012) at 195:7-196:10; [REDACTED]

Ex.

13, Marcellino Dep. (Botsford, Sept. 6, 2012) at 78:3-24; Ex. 14, Gronda Dep. (Covenant, Dec. 13, 2012) at 82:22-24; Ex. 15, Worden Dep. (Marquette, Dec. 6, 2012) at 186:19-187:1 [REDACTED]

Ex.

19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 157:1-6.

<sup>27</sup> See, e.g., [REDACTED]; Ex. 7, Smith Dep. (Ascension, Nov. 14, 2012) at 160:23-161:7; Ex. 8, Felbinger Dep. (Ascension/Borgess, Aug. 29, 2012) at 232:7-10, 234:20-236:18, 271:19-272:14, 274:1-275:19, 354:5-9; [REDACTED]

[REDACTED]; Ex. 13, Marcellino Dep. (Botsford, Sept. 6, 2012) at 74:24-78:24, 279:22-280:20; Ex. 14, Gronda Dep. (Covenant, Dec. 13, 2012) at 52:12-15, 149:25-150:9; Ex. 15, Worden Dep. (Marquette, Dec. 6, 2012) at 186:19-187:1; [REDACTED]

Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 158:7-24.

<sup>28</sup> See, e.g., Ex. 7, Smith Dep. (Ascension, Nov. 14, 2012) at 160:23-161:7; Ex. 8, Felbinger Dep. (Ascension/Borgess, Aug. 29, 2012) at 236:2-5; [REDACTED]

with any commercial payor.<sup>29</sup> Indeed, as multiple hospital deponents explained, *no* commercial payers were affected in *any way* by the MFN-plus clauses.<sup>30</sup> Blue Cross will be prejudiced by allowing new plaintiffs to proceed on a complaint that is admittedly and demonstrably false.

Second, Blue Cross will be prejudiced if Plaintiffs are allowed to proceed without telling Blue Cross their new proposed class definition. Blue Cross understands that class definitions sometimes change with the evidence, but the

---

[REDACTED] Ex. 13, Marcellino Dep. (Botsford, Sept. 6, 2012) at 110:19-111:25; Ex. 14, Gronda Dep. (Covenant, Dec. 13, 2012) at 149:6-9; Ex. 15, Worden Dep. (Marquette, Dec. 6, 2012) at 186:19-187:1; [REDACTED]

[REDACTED] Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 155:2-6, 160:18-21.

<sup>29</sup> See, e.g., [REDACTED]; Ex. 7, Smith Dep. (Ascension, Nov. 14, 2012) at 160:23-161:7; Ex. 8, Felbinger Dep. (Ascension/Borgess, Aug. 29, 2012) at 236:6-10; [REDACTED]

[REDACTED] Ex. 13, Marcellino Dep. (Botsford, Sept. 6, 2012) at 110:9-18, 112:1-5; Ex. 14, Gronda Dep. (Covenant, Dec. 13, 2012) at 82:25-83:3, 121:1-4, 147:23-149:24, 193:3-6; Ex. 15, Worden Dep. (Marquette, Dec. 6, 2012) at 183:16-184:13; [REDACTED]

[REDACTED] Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 155:2-6, 160:6-17.

<sup>30</sup> See, e.g., Ex. 7, Smith Dep. (Ascension, Nov. 14, 2012) at 160:23-161:7; Ex. 8, Felbinger Dep. (Ascension/Borgess, Aug. 29, 2012) at 354:5-9; [REDACTED]

[REDACTED] Ex. 13, Marcellino Dep. (Botsford, Sept. 6, 2012) at 75:11-77:12, 84:14-85:1, 133:25-134:7; [REDACTED]

[REDACTED] Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 155:8-12.

situation here is different. Plaintiffs have admitted that the class they will seek to certify will change and narrow dramatically from the proposed class definition in the Complaint.<sup>31</sup> Without knowing what class definition Plaintiffs propose, Blue Cross cannot properly focus its class discovery.<sup>32</sup> Plaintiffs say that Blue Cross can depose the two new plaintiffs (as well as Carpenters, the one remaining original plaintiff). But how can Blue Cross be expected to determine whether these plaintiffs are typical or adequate class representatives (among other issues) if the class to be proposed is still undeveloped and—as Plaintiffs suggest—undefined even to them?

Third, the failure to require Plaintiffs to amend their proposed class definition unfairly prejudices Blue Cross by, as Plaintiffs will no doubt argue, continuing to toll the statute of limitations on behalf of individuals and entities who the named plaintiffs no longer seek to represent. A class action suspends (or tolls)

---

<sup>31</sup> Plaintiffs say that they cannot disclose what class definition they intend to propose until their expert's analysis shows where "the MFN agreements did and did not have an impact," stating that "Our expert's work is ongoing – our class motion is not due until October 21, 2013 – and we cannot give you a more specific answer at this time." See June 13, 2013 letter from Small to Stenerson at 2, Ex. \_\_\_. But filing an amended complaint with good faith allegations is what the law requires. If Plaintiffs have such a class definition now, they need to plead it. It is certainly better than bringing new plaintiffs into a case based on allegations that Plaintiffs and their counsel know are not real allegations and that cannot be made in good faith.

<sup>32</sup> See *Morrow v. City of Tenaha*, 2010 WL 2721400 (E.D. Tex. July 8, 2010) (the "purpose" of class certification discovery is "to allow the parties to explore the facts that support or counsel against class certification.").



the applicable statute of limitations as to all asserted members of the class while the class action is pending.<sup>33</sup> The statute of limitations, however, begins to run again once class certification is denied, the original case is dismissed, or the rights of the unnamed class members are no longer pursued.<sup>34</sup> Here, once the class definition is narrowed, those who have been eliminated from the existing proposed class definition can no longer rely on the existence of this case to toll the statute of limitations on any claims they may have.<sup>35</sup> For example, Plaintiffs have admitted that they are no longer seeking to include in the class insurers such as Aetna, United, Humana, CIGNA and others, along with their customers.<sup>36</sup> Plaintiffs' decision to narrow the proposed class should be explicitly set forth in an amended complaint.

Fourth, Plaintiffs waited until after the close of merits discovery to seek to add these two new named plaintiffs. Both claim to have been injured based on payments made to Paul Oliver Memorial Hospital. Blue Cross deposed a Paul Oliver representative long ago. Had Blue Cross been aware of specific allegations by named plaintiffs related to Paul Oliver, Blue Cross would have been able to

---

<sup>33</sup> *Crown, Cork, & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983).

<sup>34</sup> *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, No. 10-3928, 2013 WL 1607295, at \*4 (6th Cir. Apr. 16, 2013).

<sup>35</sup> *Jarrett v. Kassel*, 972 F.2d 1415, 1428 (6th Cir. 1992).

<sup>36</sup> *See* Ex. 5, June 13, 2013 Small letter to Stenerson at 2.

question the Paul Oliver witness about these allegations. This is unfair and Plaintiffs' undue delay is yet another reason why the new plaintiffs should not be allowed.

**3. Plaintiffs have missed the deadline for filing an amended complaint**

The Scheduling Order entered by the Court required Plaintiffs to file a motion to amend no later than June 17, 2013. Plaintiffs made a considered, strategic decision not to file such a motion, even though an amendment is required to add new plaintiffs. Plaintiffs should bear the consequences of that decision. The motion to add the two named plaintiffs should be denied.

**B. The Just Terms for Dismissing Five Named Plaintiffs Include an Award of Costs and a Dismissal With Prejudice**

Class plaintiffs seek leave to drop five of the six named plaintiffs. They claim that their "analysis of the evidence" reveals that two, Scott Steele and The Shane Group, are not even members of their proposed class. Plaintiffs also seek to drop three plaintiffs (Veneberg, Abatement Workers, and Monroe Plumbers) because it "may not be possible to prove damages at all the MFN hospitals" and it is "not feasible to obtain and analyze" data for small insurers with "little market share" in Michigan.<sup>37</sup>

---

<sup>37</sup> Pls. Br. at 2, 4.

Blue Cross agrees that Steele and Shane Group must be dropped if they are not within the proposed class definition (among other reasons because they lack Article III standing). Blue Cross also cannot insist that the other three continue as plaintiffs if they do not think that they can prove injury. What Blue Cross does not understand, however, is why this has arisen so late in this case when Plaintiffs knew or should have known long ago that these Plaintiffs had no claims. Thus, the “just terms” for dropping these Plaintiffs’ are that (1) Blue Cross be compensated for the substantial costs it incurred in needlessly reviewing tens of thousands of pages of these plaintiffs’ documents; and (2) these plaintiffs’ claims must be dismissed with prejudice.

**1. Plaintiffs knew or should have known that neither Steele nor Shane Group ever paid an MFN hospital even before their Complaint was filed**

Plaintiffs admit that “Mr. Steele does not qualify as a member of the Class” because he did “not directly pay for hospital services at any of the hospitals” where Blue Cross had an MFN.<sup>38</sup> Plaintiffs thus admit that Steele’s repeated allegations to the contrary are wrong.<sup>39</sup> Plaintiffs claim that they learned that Steele did not

---

<sup>38</sup> Pls. Br. at 2, 4.

<sup>39</sup> Steele alleged in his original Complaint, filed on January 30, 2011, that he had paid a hospital “with which BCBSM had an agreement that contained a MFN.” *See* Class Action Complaint ¶ 13. Likewise, Steele alleged in the Consolidated Amended Complaint “that he directly paid a hospital in Michigan that had an MFN Agreement with BCBSM for Hospital Healthcare Services.” *See* Consolidated Amended Complaint ¶ 24.

actually pay an MFN hospital as a result of “the extensive work being done by their expert on the voluminous data obtained in discovery.” But that must be a gross exaggeration at best.

Whether Steele paid a hospital, the identity of that hospital, and whether that hospital had an MFN clause with Blue Cross are basic facts, not the product of expert analysis. Those facts were either within Steele’s own personal knowledge, *i.e.* exactly which hospital he paid, or among the earliest facts learned in discovery (which hospitals had an MFN). Plaintiffs now say that although Steele *did* receive treatment at an MFN hospital, he “had already reached his deductible” that was paid to a different hospital (apparently one without a MFN).<sup>40</sup> Because Steele knew, or should have known—even before his complaint was filed—that he paid his full deductible to Henry Ford, that Henry Ford did not have a MFN, and that he made no payment at all to St. John, Steele never had a good faith basis for alleging that he paid a hospital with a Blue Cross MFN. Certainly, by the time of the motion to dismiss hearing, at which counsel again re-affirmed that Steele had paid an MFN hospital, Plaintiffs should have known this was not true.

---

<sup>40</sup> Pls. Br. at 4. Although Plaintiffs’ brief does not identify the hospitals, Steele’s original complaint alleged that in 2010 he had been treated at both Henry Ford West Bloomfield Hospital and St. John Hospital. (Only the latter had a MFN.) In discovery, Steele produced records reflecting only his treatment at Henry Ford and no evidence that he had paid *any* hospital.

Similarly with respect to Shane Group, Plaintiffs say that “Counsel have determined that Shane Group did not purchase any relevant hospital services during the Class Period.”<sup>41</sup> Although Plaintiffs do not explicitly admit that this means that Shane Group is also not in the class, that is plainly so. More importantly, Plaintiffs’ ambiguous reference to the absence of Shane Group’s purchase of “relevant” hospital services during “the Class Period” appears designed to obscure the facts. Because Shane Group is a fully insured customer, Blue Cross believes that Shane Group never directly paid *any* hospital at *any* time (not merely that they did not pay an MFN hospital during the relevant class period). That is because fully insured companies like Shane Group that obtain health insurance for their employees do not themselves pay hospitals; instead hospital payments are made by the insurer, and if deductibles and co-payments are required, by the insured members. The key point, however, is that Shane Group knew or should have known, long before its complaints were filed, that it never paid *any* hospital during the class period, let alone a hospital with an MFN.<sup>42</sup>

---

<sup>41</sup> Pls. Br. at 4.

<sup>42</sup> The Shane Group’s original Complaint alleged that Shane Group “purchased, paid for, or became obligated to pay for” hospital services “directly from one or more of the hospitals with which BCBSM had an agreement that contained a MFN.” *See* October 29, 2010 Complaint ¶ 13. The Consolidated Amended Complaint similarly alleged that “Shane Group directly paid a hospital in Michigan that had an MFN Agreement with BCBSM.” *See* Consolidated Amended Complaint ¶ 19.

**2. Plaintiffs knew or should have known that the other named plaintiffs were not putative class members**

Plaintiffs ask for permission to drop three other named plaintiffs based on their recent “determination that it may not be possible to show damages at all hospitals” with an MFN. But far from being a product of their expert’s analysis of the data, that belief is embedded in the current class definition.

The original class definitions from these three plaintiffs were all based on a simple idea: anyone who directly paid a hospital with a Blue Cross MFN, at a reimbursement rate set in a contract between the hospital and either Blue Cross or another insurance company, at any time within the class period, was in the class. The Consolidated Amended Complaint, which was filed more than a year ago, proposes a class definition that recognizes that some purchases from an MFN hospital did not result in higher prices. This is accomplished through a two-part class definition that first states the class in broad, general terms, and then is narrowed to exclude certain categories of purchases from MFN hospitals. Under the revised class definition, Plaintiffs defined the class as encompassing all persons who, during the class period, directly paid a hospital that had an MFN with Blue Cross at a price contained in the “Applicable Provider Agreement.”<sup>43</sup> But the class definition then goes on to exclude several categories of purchases (effectively excluding anyone whose only hospital payments fall into the excluded categories).

---

<sup>43</sup> See Consolidated Amended Complaint ¶ 26 (first paragraph).

Two of the excluded categories are (1) Blue Cross insureds who purchased hospital services during the class period but “before the hospital had a MFN agreement” with Blue Cross; and (2) purchases made by non-Blue Cross insureds before both the hospital had an MFN agreement with Blue Cross and there was a subsequent increase in the reimbursement rate in the Applicable Provider Agreement between the hospital and the insurance company.<sup>44</sup>

The second of these exclusions reflects Plaintiffs’ implicit admission that virtually all hospitals that entered into an MFN with Blue Cross either did not increase the reimbursement rate charged to other insurers, or if they did so, it was only to certain insurers. Plaintiffs learned of many such individualized facts through attending hospital depositions that were held before the Consolidated Amended Complaint was filed, and accordingly modified their proposed class definition to include some purchases from MFN hospitals while excluding other purchases. Thus, rather than the product of “extensive expert analysis,” these Plaintiffs’ decision to seek voluntary dismissal is based on factual information they learned long ago.

**3. Blue Cross has incurred significant discovery costs relating to the claims of the five plaintiffs now sought to be dismissed**

Blue Cross served discovery directed to the claims of the five named plaintiffs who now seek to be dismissed, and who sought to represent a broad and

---

<sup>44</sup> See Consolidated Amended Complaint at ¶ 26 (second paragraph).

nuanced class. Among other things, three of those five responded by producing voluminous documents, collected not only from the plaintiff entities but also their third-party administrators. Plaintiffs did not approach Blue Cross about narrowing or clarifying its document requests; they simply produced tens of thousands of pages of documents.<sup>45</sup> Blue Cross ran searches to narrow the pool of documents necessary to review; nevertheless, it incurred significant costs to review and distill these documents—costs it would not have had to spend had Plaintiffs simply taken a moment early in the litigation (when Blue Cross raised this issue) to ascertain whether they even had a basis to assert a claim.<sup>46</sup> In addition, Blue Cross served third-party discovery, including a subpoena on Veneberg’s insurer (Medica) and incurred substantial time and cost in negotiating the scope of that subpoena and reviewing the documents Medica produced.

**C. The Remaining Plaintiff, Carpenters, Cannot Proceed Without Moving for Leave to Amend the Complaint Out of Time to Address Plaintiffs’ Admissions**

If the Court denies the motion to add the two new named plaintiffs and grants the motion to voluntarily dismiss five currently named plaintiffs (which Blue Cross supports subject to certain conditions, *see* Section B, *supra*), there will

---

<sup>45</sup> In total, these five plaintiffs produced over 180,000 pages of documents, including Abatement Workers: 71,232 pages; Plumbers 112,707 pages; Veneberg 266 pages; Shane Group 8 pages; and Steele 26 pages.

<sup>46</sup> Blue Cross also served interrogatories, which Plaintiffs have yet to completely answer and which likely will be the subject of a forthcoming motion.



be only one remaining named plaintiff. That named plaintiff, Carpenters, has filed the current motion and is bound by the various admissions made therein. As detailed above, the motion acknowledges that certain allegations in the currently operative Consolidated Amended Complaint are inconsistent with facts known to Plaintiff. Moreover, Carpenters has acknowledged in communications with Blue Cross that the proposed class definition will be materially narrowed in both geographic scope and by type of class member, *i.e.* not all commercial insurers and their customers in Michigan will be included. These concessions create a duty on Plaintiff and its counsel to amend the complaint.

Judge Rosen addressed a very similar issue in .<sup>47</sup> In *B & H Medical v. ABP Admin., Inc.*, discovery “failed to disclose any support for the antitrust claims asserted in the Complaint.”<sup>48</sup> Judge Rosen awarded Rule 11 sanctions against plaintiff’s counsel, not for the original filing of the action, but for continuing the action once they learned that the allegations could not be supported. The court stated that Rule 11 does not impose

a one-time obligation. Rather, each party is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11. In particular, after discovery has been launched, if plaintiffs are still unable to plead a

---

<sup>47</sup> See *B & H Med., LLC v. ABP Admin., Inc.*, 354 F. Supp. 2d 746 (E.D. Mich. 2005).

<sup>48</sup> *Id.* at 748.

sufficient factual basis for the allegations made against the defendants, the spectre of Rule 11 sanctions should guide the actions of plaintiffs' counsel.<sup>49</sup>

Once plaintiffs and their counsel learn that the material facts they are alleging can no longer be maintained in good faith, and that no sufficient factual basis for those allegations remains, they have a duty to stop litigating those allegations.

Thus, Plaintiff can only proceed if it seeks to file a motion for an amended complaint that includes only those allegations that can be made in good faith, including a proposed class definition for which Plaintiff and its counsel plan to seek certification.<sup>50</sup> This is required as a matter of law. The alternative whereby Plaintiff knows the allegations and proposed class, or is continuing to develop exactly what they are, but avoids telling Blue Cross, is unfair, inconsistent with the Federal Rules of Civil Procedure, and should not be permitted.

#### IV. CONCLUSION

For the foregoing reasons, Blue Cross respectfully requests that the Court (1) deny the motion to add two new named plaintiffs; and (2) allow the voluntary dismissal of the five named plaintiffs seeking such a dismissal, but only with prejudice and only with an award of costs to Blue Cross for the expenses it incurred to take discovery of these named plaintiffs. Finally, Blue Cross expects

---

<sup>49</sup> *Id.*

<sup>50</sup> That motion must account not only for the usual reasons why a motion to amend should be granted, but also why the Court should allow Plaintiff to file the amended complaint after the Court-ordered deadline.

that the lone remaining named plaintiff, Carpenters, will realize that it cannot continue to litigate without seeking to file a motion to amend the Complaint that incorporates the facts that can be plead in good faith, as well as a class definition that can be proposed in good faith.

Dated: July 8, 2013

HUNTON & WILLIAMS LLP

By: /s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Attorney for Defendant  
2200 Pennsylvania Ave, N.W.  
Washington, D.C. 20037  
(202) 955-1500

**CERTIFICATE OF SERVICE**

I hereby certify that on July 8, 2013, I caused the foregoing BLUE CROSS BLUE SHIELD OF MICHIGAN'S OPPOSITION TO PLAINTIFFS' MOTION TO ADD AND DROP NAMED PLAINTIFFS FOR THE PROPOSED CLASS to be served via electronic mail upon:

**Attorneys for Plaintiffs - The Shane Group, Michigan Regional Council of Carpenters Employee Benefits Fund, Scott Steele, Bradley A. Veneberg, Abatement Workers National Health and Welfare Fund, and Monroe Plumbers & Pipefitter Local 671 Welfare Fund:**

Daniel Small: [dsmall@cohenmilstein.com](mailto:dsmall@cohenmilstein.com)  
Brent Johnson: [bjohnson@cohenmilstein.com](mailto:bjohnson@cohenmilstein.com)  
Meghan Boone: [mboone@cohenmilstein.com](mailto:mboone@cohenmilstein.com)  
Mary Jane Fait: [fait@whafh.com](mailto:fait@whafh.com)  
John Tangren: [tangren@whafh.com](mailto:tangren@whafh.com)  
Beth Landes: [landes@whafh.com](mailto:landes@whafh.com)  
Theo Bell: [tbell@whafh.com](mailto:tbell@whafh.com)  
Dan Gustafson: [dgustafson@gustafsongluek.com](mailto:dgustafson@gustafsongluek.com)  
Dan Hedlund: [dhedlund@gustafsongluek.com](mailto:dhedlund@gustafsongluek.com)  
E. Powell Miller: [epm@millerlawpc.com](mailto:epm@millerlawpc.com)  
Jennifer Frushour: [jef@millerlawpc.com](mailto:jef@millerlawpc.com)  
Casey Fry: [caf@millerlawpc.com](mailto:caf@millerlawpc.com)

HUNTON & WILLIAMS LLP

By: /s/ Todd M. Stenerson  
Todd M. Stenerson (P51953)  
Attorney for Defendant  
2200 Pennsylvania Ave, N.W.  
Washington, D.C. 20037  
(202) 955-1500  
[tstenerson@hunton.com](mailto:tstenerson@hunton.com)

**EXHIBIT 1**  
**Filed Under Seal**

**From:** Johnson, Brent[[SMTP:B.JOHNSON@COHENMILSTEIN.COM](mailto:SMTP:B.JOHNSON@COHENMILSTEIN.COM)]  
**Sent:** Friday, January 25, 2013 8:49:12 PM  
**To:** Cummings, Ashley  
**Cc:** Small, Daniel; Boone, Meghan; [fait@whafh.com](mailto:fait@whafh.com); [tbell@whafh.com](mailto:tbell@whafh.com);  
[dgustafson@gustafsongluek.com](mailto:dgustafson@gustafsongluek.com); [dhedlund@gustafsongluek.com](mailto:dhedlund@gustafsongluek.com);  
[eahrens@gustafsongluek.com](mailto:eahrens@gustafsongluek.com); [epm@millerlawpc.com](mailto:epm@millerlawpc.com); [jef@millerlawpc.com](mailto:jef@millerlawpc.com);  
[caf@millerlawpc.com](mailto:caf@millerlawpc.com); Davis, Brenda; Hoffman, Bruce  
**Subject:** RE: BCBSM: Plaintiffs' Document Production & Depositions  
**Auto forwarded by a Rule**

Ashley-

I received your letter yesterday. Concerning the document production, first, we sent an additional production today via overnight FedEx to Bruce Hoffman's attention. I believe it is 1790 documents. We will be sending an additional production of approximately 30,000 documents mid-next week.

Second, Blue Cross's requests to plaintiffs are very broad and numerous, but we have sought to comply with them faithfully despite the significant expense, time and effort necessary. Our extremely rough, but best current estimate of the volume of the production to come, is 75,000 documents (including those noted above). As you may imagine, it could vary up or down significantly based our review. We will make our best efforts to substantially complete production by mid-February. The production will be a rolling one; I anticipate that it will be more frequent than bi-weekly on average. The vast majority of the documents are related to the three union fund plaintiffs. The overall collection is substantially complete.

On the depositions, we can provide you with the following, but we also continue to work to make progress here. Scott Steele is not a member of our class in the end, so he will no longer be a plaintiff nor be deposed nor be producing any additional documents. Bradley Veneberg is available for deposition in Munising, Michigan up in the UP on February 20 and 21. We believe we can complete his production by the end of the month if not before. It will be small. A representative of the Shane Group is available for deposition on February 27 or 28 or March 1 in Hillsdale, MI. Their production will be modest compared to the union fund plaintiffs and we should be able to provide it to give you plenty of time to review it. For the three union fund plaintiffs, those depositions will take place after the Veneberg and Shane Group depositions and either in Detroit or very close to it. We continue to work there on dates that would be convenient for everyone. We also work every day to complete their productions.

I hope this information helps you plan your efforts over the coming weeks and months. Please do not hesitate to call, email or write with any questions or concerns.

Best regards,

Brent

Image0002



**Brent W. Johnson**  
Partner

**COHEN MILSTEIN SELLERS & TOLL PLLC**

1100 New York Avenue, NW | Suite 500 West

Washington, DC 20005

t: 202.408.4600 | f: 202.408.4699

[www.cohenmilstein.com](http://www.cohenmilstein.com)

**EXHIBIT 2**  
**Filed Under Seal**



**From:** Dan Hedlund[SMTP:DHEDLUND@GUSTAFSONGLUEK.COM]  
**Sent:** Tuesday, February 26, 2013 11:28:02 AM  
**To:** Cummings, Ashley  
**Cc:** [bjohnson@cohenmilstein.com](mailto:bjohnson@cohenmilstein.com); Ellen Ahrens  
**Subject:** Steele Stipulation--BCBS MI  
**Auto forwarded by a Rule**

Ashley

Attached find a revised draft stipulation which hopefully addresses the concern you raised when we last spoke.

Please review and let me know if it is acceptable to you, who we should put down for e-signature from your side and that we have consent to do so, and we will get the document over to the Court.

Best regards,

Dan

**Daniel C. Hedlund**  
**Gustafson Gluek PLLC**  
Canadian Pacific Plaza  
120 South Sixth Street, Suite 2600  
Minneapolis, MN 55402  
Phone: (612) 333-8844

[profile](#) | [website](#) | [vCard](#) | [map](#)

---

*committed to the protection of fair competition ...*

---

This message has been sent from a law firm and may contain information, which is confidential and/or privileged, and is intended only for the person or entity to which it is addressed. This email (including attachments) is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521. If you are not the intended recipient any review, retransmission, dissemination or other use of or taking of any action upon this information by person(s) or entity(ies) other than the intended recipient(s) is prohibited. If you received this electronic mail transmission in error, please delete it from your system without copying it and notify the sender by reply email or by calling (612) 333-8844, so that our address records, can be corrected.  
Thank you.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

_____	)	
THE SHANE GROUP, INC., et al.,	)	
on behalf of themselves and all others	)	
similarly situated.	)	Case No. 2:10-cv-14360-DPH-MKM
	)	
Plaintiffs,	)	Hon. Denise Page Hood
	)	
v.	)	
	)	
BLUE CROSS BLUE SHIELD OF	)	
MICHIGAN,	)	
	)	
Defendant.	)	
_____	)	

**STIPULATED ORDER OF DISMISSAL**  
**WITH PREJUDICE AND WITHOUT COSTS**

This matter comes respectfully before the Court by way of stipulation of the parties. Having determined the identity of all Michigan hospitals with a most favored nation provider agreement with Defendant, and having determined that he has not paid for services at one of those hospitals during the relevant time period, Plaintiff Scott Steele has concluded that he is not a member of the putative class and hereby voluntarily dismisses his individual claims in the above-captioned matter with prejudice, without costs and attorney fees being assessed against any party. Plaintiff Steele’s claims were initially filed in *Steele v. Blue Cross Blue Shield of Michigan*, Case No. 2:11-cv-10375-DPH-VMM, and his case was later consolidated (*See* Docket No. 56). The Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT Plaintiff Scott Steele's individual claims are dismissed with prejudice, and without costs and attorney fees being assessed against any party in this matter.

---

Judge Denise Page Hood

The undersigned agrees to the form of this Order:

**FOR PLAINTIFF SCOTT STEELE**

**FOR DEFENDANT BLUE CROSS  
BLUE SHIELD OF MICHIGAN**

Dated: February\_\_\_\_, 2013

Dated: February \_\_\_\_\_, 2013

/s/ Alyson Oliver

/s/\_\_\_\_\_ (with consent)

Alyson Oliver  
P55020  
**OLIVER LAW GROUP PC**  
950 W. University Drive, Suite 2001  
Rochester, MI 48307  
Phone: 248-327-6556  
[aoliver@oliverlg.com](mailto:aoliver@oliverlg.com)

D. Bruce Hoffman  
(Adm. E.D. Mich., DC Bar #495385)  
**HUNTON & WILLIAMS LLP**  
900 K Street, N.W.  
Washington, DC 20006  
Phone: 202-955-1500  
[bhoffman@hunton.com](mailto:bhoffman@hunton.com)

Dianne Nast  
**RODCAST, P.C.**  
801 Estelle Drive  
Lancaster, PA 17601  
Phone: 717-892-3000  
[dnast@rodnast.com](mailto:dnast@rodnast.com)

W. Joseph Bruckner  
Richard A. Lockridge  
**LOCKRIDGE GRINDAL NAUEN P.L.L.P**  
100 Washington Ave. S., Suite 2200  
Minneapolis, MN 55401  
Phone: 612-339-6900  
[wjbruckner@locklaw.com](mailto:wjbruckner@locklaw.com)  
[ralockridge@locklaw.com](mailto:ralockridge@locklaw.com)

Charles Zimmerman  
Anne T. Regan  
**ZIMMERMAN REED, PLLP**  
1100 IDS Center  
80 South 8<sup>th</sup> Street  
Minneapolis, MN 55402  
Phone: 612-341-0400  
[Charles.zimmerman@zimmreed.com](mailto:Charles.zimmerman@zimmreed.com)  
[Anne.regan@zimmreed.com](mailto:Anne.regan@zimmreed.com)

Joseph Goldberg  
**FREEDMAN BOYD HOLLANDER  
GOLDBERG & IVES, P.A.**  
20 First Plaza, Suite 700  
Albuquerque, NM 87102  
Phone: 505-842-9960  
[jg@fbdlaw.com](mailto:jg@fbdlaw.com)

*Attorneys for Plaintiff Scott Steele*

Daniel E. Gustafson  
Daniel C. Hedlund  
Ellen M. Ahrens  
**GUSTAFSON GLUEK PLLC**  
120 South Sixth Street, Suite 2600  
Minneapolis, MN 55402  
Telephone: (612) 333-8844  
Facsimile: (612) 339-6622  
[dgustafson@gustafsongluek.com](mailto:dgustafson@gustafsongluek.com)  
[dhedlund@gustafsongluek.com](mailto:dhedlund@gustafsongluek.com)  
[eahrens@gustafsongluek.com](mailto:eahrens@gustafsongluek.com)

*Attorneys for Plaintiff Scott Steele and  
Interim Class Counsel*

E. Powell Miller  
**THE MILLER LAW FIRM, P.C.**  
950 West University Drive, Suite 300  
Rochester, Michigan 48307  
[epm@millerlawpc.com](mailto:epm@millerlawpc.com)

Mary Jane Fait  
Theodore B. Bell  
**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLC**  
55 West Monroe Street, Suite 1111  
Chicago, Illinois 60603  
Tel: (312) 984-0000  
[fait@whafh.com](mailto:fait@whafh.com)  
[tbell@whafh.com](mailto:tbell@whafh.com)

Daniel A. Small  
Brent W. Johnson  
Meghan M. Boone  
**COHEN MILSTEIN SELLERS  
& TOLL PLLC**  
1100 New York Avenue, NW, Suite 500  
Washington, DC 20005  
Telephone: (202) 408-4600  
[dsmall@cohenmilstein.com](mailto:dsmall@cohenmilstein.com)  
[bjohnson@cohenmilstein.com](mailto:bjohnson@cohenmilstein.com)  
[mboone@cohenmilstein.com](mailto:mboone@cohenmilstein.com)

*Interim Class Counsel*

David H. Fink (P28235)  
Darryl Bressack (P67820)  
**FINK + ASSOCIATES LAW**  
100 West Long Lake Rd, Suite 111  
Bloomfield Hills, MI 48304  
Telephone: (248) 971-2500  
Email: [dfink@finkandassociateslaw.com](mailto:dfink@finkandassociateslaw.com)

*Interim Liaison Counsel*

**EXHIBIT 3**  
**Filed Under Seal**

**From:** Cummings, Ashley  
**Sent:** Friday, April 26, 2013 5:05 PM  
**To:** [bjohnson@cohenmilstein.com](mailto:bjohnson@cohenmilstein.com)  
**Cc:** 'DHedlund@gustafsongluek.com' ([DHedlund@gustafsongluek.com](mailto:DHedlund@gustafsongluek.com)); [tbell@whafh.com](mailto:tbell@whafh.com); 'Mary Jane Fait' ([fait@whafh.com](mailto:fait@whafh.com)); Stenerson, Todd M.; Hoffman, Bruce; Gilman, Neil; Converse, Michael L  
**Subject:** FW: BCBSM/Shane - Steele Stipulation

Dear Brent:

I am following up regarding the attached proposed stipulation regarding Scott Steele and our communications below. We have asked Plaintiffs to confirm simply that each remaining named plaintiff has a factual basis to assert that it directly paid for hospital services at a hospital that entered into a provider agreement with Blue Cross that included an MFN clause during the relevant period.

This is the same issue we raised upon receiving Plaintiffs' Consolidated Amended Complaint. Yet still we have received no clear confirmation of this basic point. As you know, we have expended considerable resources litigating Plaintiffs' proposed claims based on these named plaintiffs.

Please let us know by next week whether you will agree to this stipulation and confirm this point. If Plaintiffs will not—or cannot—do so, we will need to consider filing a motion.

Sincerely,

Ashley

[Home](#) [V Card](#) [Bio](#)

	<p><b>Ashley Cummings</b> Partner <a href="mailto:acummings@hunton.com">acummings@hunton.com</a></p> <p>Hunton &amp; Williams LLP Bank of America Plaza, St 4100 600 Peachtree Street, N.E. Atlanta, GA 30308 Phone: (404) 888-4223 Fax: (404) 602-9019 <a href="http://www.hunton.com">www.hunton.com</a></p>
---	--



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

_____	)	
THE SHANE GROUP, INC., et al.,	)	
on behalf of themselves and all others	)	
similarly situated.	)	Case No. 2:10-cv-14360-DPH-MKM
	)	
Plaintiffs,	)	Hon. Denise Page Hood
	)	
v.	)	
	)	
BLUE CROSS BLUE SHIELD OF	)	
MICHIGAN,	)	
	)	
Defendant.	)	
_____	)	

**STIPULATED ORDER OF DISMISSAL**  
**WITH PREJUDICE AND WITHOUT COSTS**

This matter comes respectfully before the Court by way of stipulation of the parties. Having determined the identity of all Michigan hospitals with a most-favored-nation-provider agreement with Defendant Blue Cross Blue Shield of Michigan (“BCBSM”), and having determined that he ~~has~~did not ~~directly~~pay for services at one of those hospitals during the relevant time period, Plaintiff Scott Steele has concluded that he is not a member of the putative class and hereby voluntarily dismisses his individual claims in the above-captioned matter with prejudice, without costs and attorney fees being assessed against any party. Plaintiff Steele’s claims were initially filed in *Steele v. Blue Cross Blue Shield of Michigan*, Case No. 2:11-cv-10375-DPH-VMM, and his case was later consolidated (~~See~~ See Docket No. 56) and he was named

as a plaintiff in the Consolidated Amended Complaint filed June 22, 2012 (see Docket No. 78).

~~The Court being fully advised in the premises,~~

Plaintiffs confirm that each remaining named plaintiff has a factual basis to assert that it directly paid for hospital services at a hospital that entered into a provider agreement with BCBSM that included a most-favored-nation clause during the relevant period.

The Court being fully advised in the premises,

IT IS HEREBY ORDERED THAT Plaintiff Scott Steele's individual claims are dismissed with prejudice, and without costs and attorney fees being assessed against any party in this matter.

\_\_\_\_\_  
Judge Denise Page Hood

The undersigned agrees to the form of this Order:

**FOR PLAINTIFF SCOTT STEELE**

**FOR DEFENDANTS BLUE CROSS BLUE SHIELD OF MICHIGAN**

Dated: March , 2013

Dated: March , 2013

/s/ Alyson Oliver  
Alyson Oliver (P55020)  
**OLIVER LAW GROUP PC**  
950 W. University Drive, Suite 2001  
Rochester, MI 48307  
Phone: 248-327-6556  
aoliver@oliverlg.com

/s/ (with consent)  
Todd M. Stenerson (P51953)  
**HUNTON & WILLIAMS LLP**  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
Phone: 202-955-1500  
tstenerson@huton.com

**FOR PLAINTIFF SCOTT STEELE**

**FOR DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN**

<del>Dated: February _____, 2013</del>	<del>Dated: February _____, 2013</del>
<del>/s/ Alyson Oliver _____</del>	<del>/s/ _____ (with consent)</del>
<del>Alyson Oliver _____</del>	<del>D. Bruce Hoffman _____</del>
<del>P55020 _____</del>	<del>(Adm. E.D. Mich., DC Bar #495385)</del>
<del><b>OLIVER LAW GROUP PC</b> _____</del>	<del><b>HUNTON &amp; WILLIAMS LLP</b> _____</del>
<del>950 W. University Drive, Suite 2001 _____</del>	<del>900 K Street, N.W. _____</del>
<del>Rochester, MI 48307 _____</del>	<del>Washington, DC 20006 _____</del>
<del>Phone: 248-327-6556 _____</del>	<del>Phone: 202-955-1500 _____</del>
<del><a href="mailto:aoliver@oliverlg.com">aoliver@oliverlg.com</a> _____</del>	<del><a href="mailto:bhoffman@hunton.com">bhoffman@hunton.com</a> _____</del>

Dianne Nast  
**RODCAST, P.C.**  
801 Estelle Drive  
Lancaster, PA 17601  
Phone: 717-892-3000  
[dnast@rodcast.com](mailto:dnast@rodcast.com)

W. Joseph Bruckner  
Richard A. Lockridge  
**LOCKRIDGE GRINDAL NAUEN P.L.L.P**  
100 Washington Ave. S., Suite 2200  
Minneapolis, MN 55401  
Phone: 612-339-6900  
[wjbruckner@locklaw.com](mailto:wjbruckner@locklaw.com)  
[ralockridge@locklaw.com](mailto:ralockridge@locklaw.com)

Charles Zimmerman  
Anne T. Regan  
**ZIMMERMAN REED, PLLP**  
1100 IDS Center  
80 South 8<sup>th</sup> Street  
Minneapolis, MN 55402  
Phone: 612-341-0400  
[Charles.zimmerman@zimmreed.com](mailto:Charles.zimmerman@zimmreed.com)  
[Anne.regan@zimmreed.com](mailto:Anne.regan@zimmreed.com)

Joseph Goldberg  
**FREEDMAN BOYD HOLLANDER  
GOLDBERG & IVES, P.A.**  
20 First Plaza, Suite 700  
Albuquerque, NM 87102  
Phone: 505-842-9960  
[jg@fbdlaw.com](mailto:jg@fbdlaw.com)

*Attorneys for Plaintiff Scott Steele*

Daniel E. Gustafson  
Daniel C. Hedlund  
Ellen M. Ahrens  
**GUSTAFSON GLUEK PLLC**  
120 South Sixth Street, Suite 2600  
Minneapolis, MN 55402  
Telephone: (612) 333-8844  
Facsimile: (612) 339-6622  
[dgustafson@gustafsongluek.com](mailto:dgustafson@gustafsongluek.com)  
[dhedlund@gustafsongluek.com](mailto:dhedlund@gustafsongluek.com)  
[eahrens@gustafsongluek.com](mailto:eahrens@gustafsongluek.com)

*Attorneys for Plaintiff Scott Steele and  
Interim Class Counsel*

E. Powell Miller  
**THE MILLER LAW FIRM, P.C.**  
950 West University Drive, Suite 300  
Rochester, Michigan 48307  
[epm@millerlawpc.com](mailto:epm@millerlawpc.com)

Mary Jane Fait  
Theodore B. Bell  
**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLC**  
55 West Monroe Street, Suite 1111  
Chicago, Illinois 60603  
Tel: (312) 984-0000  
[fait@whafh.com](mailto:fait@whafh.com)  
[tbell@whafh.com](mailto:tbell@whafh.com)

Daniel A. Small  
Brent W. Johnson  
Meghan M. Boone

**COHEN MILSTEIN SELLERS  
& TOLL PLLC**

1100 New York Avenue, NW, Suite 500  
Washington, DC 20005  
Telephone: (202) 408-4600  
[dsmall@cohenmilstein.com](mailto:dsmall@cohenmilstein.com)  
[bjohnson@cohenmilstein.com](mailto:bjohnson@cohenmilstein.com)  
[mboone@cohenmilstein.com](mailto:mboone@cohenmilstein.com)

*Interim Class Counsel*

David H. Fink (P28235)  
Darryl Bressack (P67820)  
**FINK + ASSOCIATES LAW**  
100 West Long Lake Rd, Suite 111  
Bloomfield Hills, MI 48304  
Telephone: (248) 971-2500  
Email: [dfink@finkandassociateslaw.com](mailto:dfink@finkandassociateslaw.com)

*Interim Liaison Counsel*

**EXHIBIT 4**  
**Filed Under Seal**



HUNTON & WILLIAMS LLP  
2200 PENNSYLVANIA AVENUE, NW  
WASHINGTON, DC 20037

TEL 202 • 955 • 1500  
FAX 202 • 788 • 2201

TODD M. STENERSON  
DIRECT DIAL: 202 • 419 • 2184  
EMAIL: [tstenson@hunton.com](mailto:tstenson@hunton.com)

June 12, 2013

**VIA ELECTRONIC MAIL**

Daniel Small, Esq.  
Cohen Milstein Sellers & Toll PLLC  
1100 New York Avenue, NW, Suite 500  
Washington, DC 20005  
[dsmall@cohenmillstein.com](mailto:dsmall@cohenmillstein.com)

***The Shane Group, Inc. v. Blue Cross Blue Shield of Michigan,  
No. 2:10-cv-14360, U.S. Dist. Ct., E.D. Mich.***

Dear Dan:

This letter follows our discussions concerning Plaintiffs' anticipated motion to add and dismiss proposed class representatives, and your email today indicating that Plaintiffs expect to dismiss all current named plaintiffs except Michigan Regional Council of Carpenters (MRCC). Plaintiffs still have not indicated why they wish to drop five named plaintiffs, and why Plaintiffs have decided to do so now – fundamentally changing the structure of Plaintiffs' claims after Blue Cross has spent years and hundreds of thousands of dollars in discovery relating to the case.

In addition, Plaintiffs have stated that they do not plan to amend their complaint under Rule 15, and neither are Plaintiffs yet certain which named plaintiffs they will seek to add. What is more, Plaintiffs have indicated that the class definition on which they will seek certification will be different than the definition in the current complaint; nevertheless, Plaintiffs will not change the proposed definition in the complaint and will not tell us the proposed class definition until Plaintiffs file their class certification motion. Such an approach is completely backwards and inconsistent with the Court's Order.

First, the Court ordered Plaintiffs to file a motion to amend the complaint by June 17. Given Plaintiffs' statement that they do not intend to amend under Rule 15, it is unclear what Plaintiffs intend to do, but it appears not to comply with the Court's Order.





Daniel Small, Esq.  
June 12, 2013  
Page 2

Second, the Court ordered Plaintiffs to meet and confer with Blue Cross by June 10 to determine whether the parties can resolve the motion due next Monday. Blue Cross cannot, however, meaningfully meet and confer without being told in advance of Plaintiffs' June 17 filing:

- (1) The procedural rule under which Plaintiffs are moving;
- (2) What Class Representatives Plaintiffs propose to add and why;
- (3) Why Plaintiffs now seek to dismiss the five Class Representatives listed in your email;
- (4) The definition of the class Plaintiffs are pursuing; and
- (5) Which allegations in the Consolidated Class Action Compliant Plaintiffs are still prosecuting (particularly those related to the so-called "MFN-plus" clauses).

As should be obvious, without fair notice of Plaintiffs' proposed class definition and who the proposed named plaintiffs are, Blue Cross cannot know what discovery to take to determine, among other things, whether the named plaintiffs adequately represent an as-yet-to-be-proposed class.


What is more, neither MRCC as the remaining current named plaintiff nor any new named plaintiffs can continue to press allegations Plaintiffs know to be incorrect and lacking any factual basis. As we have explained in multiple calls, there is no factual basis in the record to support the current allegations that MFN-plus clauses in Blue Cross's contracts caused any hospital to raise rates, refuse to lower rates, or cancel any contract setting rates for hospital services.

HUNTON &  
WILLIAMS

Daniel Small, Esq.  
June 12, 2013  
Page 3

Please provide the information requested no later than the close of business tomorrow. As noted, no meaningful meet-and-confer discussions can occur without this information. Once we receive it, we will be able to confer about your proposed motion shortly thereafter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Todd M. Stenerson', with a long horizontal flourish extending to the right.

Todd M. Stenerson

cc: Via Email:  
Dan Hedlund, Esq.  
D. Bruce Hoffman, Esq.

**EXHIBIT 5**  
**Filed Under Seal**



COHEN MILSTEIN

Daniel A. Small  
(202) 408-4610  
dsmall@cohenmilstein.com

June 13, 2013

*Via Email Only*

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

Re: *The Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*  
*E.D. Mich., Case No. 10-cv-143 60-DPH-MKM*

Dear Todd:

I write in response to your letter that you sent to me yesterday concerning plaintiffs' forthcoming motion to add and drop plaintiffs. You ask us to provide various information to you by the close of business today, which information you claim is necessary for you to be able to meet and confer with us regarding this motion. As you know, we have already provided you with some of the information you have sought, other information is irrelevant to our motion, and other information we do not have at this time but have committed to provide to you as soon as possible.

Contrary to your assertion that "Plaintiffs still have not indicated why they wish to drop five named plaintiffs, and why Plaintiffs have decided to do so now," we provided you with that information six weeks ago. In an email to Bruce Hoffman on May 1, 2013, I told him the following:

"As for our need to drop and add plaintiffs, we have been guided by what the evidence and our analysis show. When we believed we had learned with sufficient certainty the identity of all hospitals with which BCBSM had an MFN agreement, we notified you that one of our 6 plaintiffs, Scott Steele, had not purchased hospital services at any of those hospitals, and we advised you that we would be voluntarily dismissing his claims. In preparing a class certification report, our expert has been working with the available data to analyze impact and damages issues. Our expert's work has taught us that the burden of working with



June 13, 2013  
Page 2

BCBSM and third party data is very substantial, that we will not therefore get and work with the data for every insurer, no matter how small, that provided coverage at a Michigan MFN hospital, and that, with respect to the insurers whose data we do have, we likely will not find damages at every MFN hospital. For these reasons, we are prepared at this time to drop the claims of The Shane Group, Bradley Veneberg, Abatement Workers and Monroe Plumbers, and proceed on the claims of Michigan Regional Council of Carpenters.”

This identified the plaintiffs we seek to drop and the reasons why.

We also advised you in our recent motion to amend Scheduling Order No. 3, which you reviewed and agreed not to oppose, that we might seek to add plaintiffs “to address an argument that BCBSM may make regarding the adequacy of the class representatives under Rule 23(a)(4) ....” (Doc. #121 at 2) I also discussed this issue with you and Bruce when we were assessing whether to seek to add any new plaintiffs.

Further, we have advised you repeatedly that we would be narrowing our class definition based on our review and analysis of the evidence, in particular, our expert’s analysis of the data and where that analysis showed that the MFN agreements did and did not have an impact. We told you on May 1 that we will not be seeking to recover for those who purchased hospital services through an insurer network where we do not have that insurer’s data. As you know, we have data for BCBSM, Priority, HAP and Health Plus. So you know that our class will be narrowed to exclude those who purchased through any other insurer. This is the best disclosure we can give you at this time. Our expert’s work is ongoing – our class motion is not due until October 21, 2013 – and we cannot give you a more specific answer at this time. The best we can do is to commit that we will tell you our narrowed class definition when our expert’s work is far enough along that we can be confident that the results are unlikely to change. I note that, contrary to your assertion, at no time have we refused to provide you with a narrowed class definition. Rather, we have consistently told you that we are not yet in a position to give you more information about the new definition than we have given you already.

In an email yesterday morning, before you sent your letter, I told you that “when we have clarity as to which plaintiffs we will seek to add, we will advise you of that promptly.” Clients decide if and when they want to retain a lawyer; the lawyer does not make that decision. The best we can do is what we have done—commit to provide you with the information as soon as we have it.

Two of your requests seem to be irrelevant to your ability to meet and confer on our motion to add and drop plaintiffs. As I told you in our phone call on Monday, for meet-and-confer purposes, the only relevant information is the relief we are seeking. Thus, it should not matter which procedural rule we will invoke to seek that relief. Nonetheless, we have no problem advising you that we intend to seek to add plaintiffs under Rule 20 and to drop plaintiffs



June 13, 2013  
Page 3

under Rule 41. We understand that the Court set June 17 as the deadline for a “Motion to Amend Complaint to Add/Dismiss Plaintiffs,” but the Court also granted our motion in which we forthrightly stated that “Plaintiffs may take the position that they may add plaintiffs without amending the complaint.” (Doc. #121 at 2) Under these circumstances, we do not interpret the Court’s reference to an amended complaint in setting a deadline for us to move to add and drop plaintiffs as requiring us to add or drop plaintiffs only through amendment of the complaint. But you are free to argue otherwise in response to our motion, and the Court will tell us who is right. Also, we may move under Rule 15 in the alternative to moot this issue.

Regarding updating the allegations of the complaint, we do not see how that is relevant to your ability to meet and confer on our motion to add and drop plaintiffs. Further, we are confident that our class motion will fully describe our case as we understand it. We are not seeking to hide the ball. Rather, we are seeking not to waste the class’s resources updating our allegations now, when we will do so for our class motion in October. Further, we have told you that we expect that both documentary evidence and our expert’s analysis will provide a “factual basis in the record to support” our allegations that MFN-plus provisions caused reimbursement rates at some hospitals to be higher than they otherwise would have been.

As for your contention that “Blue Cross cannot know what discovery to take to determine, among other things, whether the named plaintiffs adequately represent an as-yet-to-be-proposed class,” we have told you repeatedly that we would cooperate with you so that you can complete discovery of any new plaintiffs by the time we file our class motion. You will have a fair opportunity to take discovery on the adequacy of the named plaintiffs well before you must respond to our class motion. You can also be confident that our narrowed class will include at least some of the purchases of hospital services by any new plaintiffs.

In short, we have provided you with the information that we can that is relevant to our motion to add and drop plaintiffs. And we have committed to provide you with other relevant information as soon as we have it.

We remain available to meet and confer with you further (beyond our call on Monday), and to discuss any of the issues addressed in this letter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Dan", located below the closing text.

Daniel A. Small

cc: Bruce Hoffman

**EXHIBIT 7**  
**Filed Under Seal**

HIGHLY CONFIDENTIAL: Smith, Robert 11-14-2012

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

```

-----:
UNITED STATES OF AMERICA AND :
THE STATE OF MICHIGAN,      : Civil Action No.:
    Plaintiffs,              :
    vs.                       : 2:10-cv-14155-DPH-MKM
BLUE CROSS BLUE SHIELD OF   : Judge Denise Page Hood
MICHIGAN,                   : Magistrate Judge
    Defendant.               : Mona K. Majzoub
-----:

```

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

```

-----:
AETNA INC.,                 :
    Plaintiff,               :
    vs.                      : Civil Action No.:
BLUE CROSS BLUE SHIELD OF   : 2:11-cv-15346-DPH-MKM
MICHIGAN,                   :
    Defendant.               :
-----:

```

St. Louis, Missouri  
Wednesday, November 14, 2012

CONFIDENTIAL VIDEOTAPED DEPOSITION OF:

ROBERT SMITH

The deposition of ROBERT SMITH, a witness called at the instance of the Plaintiffs taken on November 14, 2012, at 9:00 a.m., at the offices of Armstrong Teasdale, LLP, 7700 Forsyth Boulevard, Suite 1800, in the city of St. Louis, state of Missouri, before Andrea M. Murphy, Registered Professional Reporter, Illinois Certified Shorthand Reporter No. 084-004558, Missouri Certified Court Reporter No. 989 pursuant to notice.



159

1 MR. HOFFMAN: And I should have warned the 02:27:25PM  
2 court reporter that I have a tendency to talk really 02:27:26PM  
3 fast, which I will try my best to control. 02:27:29PM

4 BY MR. HOFFMAN: 02:27:34PM

5 Q I'm not going to spend a lot of time on this 02:27:35PM  
6 document with you, sir, but I want to direct your 02:27:37PM  
7 attention to the third page of it, which has Bates stamp 02:27:39PM  
8 AH-000038, and specifically to clause 8, which you were 02:27:42PM  
9 discussing a moment ago with Aetna's counsel. 02:27:49PM

10 Do you remember that? 02:27:52PM

11 A Yes. 02:27:53PM

12 Q Now, earlier today you testified that payor 02:27:53PM  
13 diversification -- creating leverage with other payors 02:27:58PM  
14 is a strategy by which Ascension Health hopes to 02:28:02PM  
15 increase the rates by all payors. 02:28:06PM

16 Do you recall that testimony? 02:28:10PM

17 A Yes. 02:28:11PM

18 Q Now, in this particular document in Smith 11, 02:28:11PM  
19 you wrote under Section 8(a) and counsel asked you about 02:28:20PM  
20 a most favored nations clause and you -- and 02:28:25PM  
21 specifically the language where you wrote that the goal 02:28:29PM  
22 should be to remove from the contract that language 02:28:32PM  
23 "because the MFN clause effectively neutralizes our 02:28:34PM  
24 ability to create leverage by developing other payor 02:28:38PM

160

1 relationships." 02:28:41PM

2 Do you see that language, sir? 02:28:41PM

3 A Yes, I do. 02:28:43PM

4 Q So the MFN, to understand this clause, 02:28:44PM

5 neutralizes your ability to use an Ascension strategy to 02:28:51PM

6 increase the price that Ascension would charge to or 02:28:55PM

7 receive from Blue Cross and all the payors. It 02:28:58PM

8 neutralizes your leverage strategy to get a higher price 02:29:01PM

9 from everybody. 02:29:06PM

10 MR. HOLLEMAN: Objection to the form. 02:29:08PM

11 BY MR. HOFFMAN: 02:29:08PM

12 Q Correct? 02:29:09PM

13 A Potentially I think it's right. 02:29:09PM

14 Q Do you know, Mr. Smith, if the 2006 LOU, or 02:29:13PM

15 letter of understanding, contained an MFN ultimately? 02:29:19PM

16 A The 2006 did not, if my memory serves me 02:29:24PM

17 correctly. 02:29:30PM

18 Q Okay. So did a Blue Cross MFN in the 02:29:30PM

19 2005-'6-'7-'8 time period affect Ascension's 02:29:36PM

20 negotiations and relationships with any other payors in 02:29:46PM

21 Michigan? 02:29:49PM

22 A No. 02:29:50PM

23 Q Now, there is an MFN clause or a most favored 02:29:50PM

24 discount clause or however you want to describe it in 02:29:55PM

161

1 the current letter of understanding between Ascension 02:29:58PM

2 and Blue Cross Blue Shield of Michigan. Correct? 02:30:00PM

3 A Correct. 02:30:03PM

4 Q To the best of you knowledge, has that 02:30:05PM

5 provision affected Ascension's relationships with or 02:30:07PM

6 negotiations with any other payors in Michigan? 02:30:11PM

7 A To the best of my knowledge, no. 02:30:14PM

8 Q Okay. Now, if you can cast your mind all the 02:30:16PM

9 way back to 10:00 or so this morning, you may recall 02:30:25PM

10 that counsel for the government was asking you about the 02:30:28PM

11 PHA. 02:30:32PM

12 Do you recall that? 02:30:33PM

13 A Yeah. 02:30:34PM

14 Q Okay. And -- 02:30:34PM

15 MR. DEMITRACK: At 10:00, you actually 02:30:36PM

16 remember that? 02:30:37PM

17 THE WITNESS: Well, keep going. See how much 02:30:37PM

18 I remember. 02:30:40PM

19 BY MR. HOFFMAN: 02:30:40PM

20 Q Well, and you testified, if I recall 02:30:41PM

21 correctly, that the -- I'm going to paraphrase here, so 02:30:45PM

22 forgive me if I get it slightly wrong -- but that the 02:30:48PM

23 PHA -- you -- in your view the PHA helped Blue Cross by 02:30:52PM

24 limiting hospitals' options or constraining hospitals 02:30:59PM

162

1 from negotiating price increases. 02:31:02PM

2 Do you recall that? 02:31:05PM

3 A I do. 02:31:05PM

4 Q Okay. Is it your view that the PHA -- or 02:31:06PM

5 being in Blue Cross' PHA makes it harder for Ascension 02:31:09PM

6 Health to negotiate price increases or rate increases 02:31:14PM

7 from Blue Cross? 02:31:17PM

8 A Yes, it does. 02:31:18PM

9 Q Okay. Let me go, sir, to -- well, let me ask 02:31:23PM  
10 you -- rather than looking at an exhibit, let me just 02:31:35PM

11 ask you a question. 02:31:37PM

12 There was a lot of talk earlier today about 02:31:38PM  
13 strategic relationships with -- between Ascension Health 02:31:40PM  
14 and payors. Correct? 02:31:44PM

15 A Yes. 02:31:47PM

16 Q Okay. Now, at one point I believe that you 02:31:47PM  
17 said that a -- suggested that a strategic relationship 02:31:51PM  
18 might include, for example, a narrow network 02:31:55PM  
19 arrangement. 02:31:59PM

20 Do you recall that? 02:31:59PM

21 A Not really but . . . 02:32:00PM

22 Q Okay. Well, let me ask you -- 02:32:03PM

23 A I remember the conversation, but I don't 02:32:05PM  
24 remember what I testified to. 02:32:07PM

**EXHIBIT 8**  
**Filed Under Seal**

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

```

-----:
UNITED STATES OF AMERICA and   :
the STATE OF MICHIGAN,         :   Civil Action no.:
                                :
                                :   2:10-cv-14155-DPH-MKM
                                :
                                :   Judge Denise Page Hood
                                :
                                :
                                :   Magistrate Judge
-----:   Mona K. Majzoub

```

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

```

-----:
AETNA INC.,                     :
                                :
                                :   Civil Action No.
                                :
                                :   2:11-cv-15346-DPH-MKM
                                :
                                :
                                :
-----:

```

Kalamazoo, Michigan

Wednesday, August 29, 2012

Highly Confidential Video Deposition of:

RICHARD L. FELBINGER,

was called for oral examination by counsel for Plaintiff, pursuant to Notice, at Miller Canfield, 277 South Rose Street, Kalamazoo, Michigan, before Michele E. French, RMR, CRR, of Capital Reporting Company, a Notary Public in and for the State of Michigan, beginning at 9:06 a.m., when were present on behalf of the respective parties:

1 MR. JOYCE: There is, Tom.

2 MR. DEMITRACK: Okay. **15:26:07**

3 MR. STENERSON: Do you care to expound on  
4 your objection?

5 MR. JOYCE: What's your question about  
6 the objection?

7 MR. STENERSON: What's inappropriate **15:26:12**  
8 about the foundation about asking this witness about the  
9 contract --

10 MR. DEMITRACK: Well, this clause has  
11 been in effect since July of 2008. I mean, that is your  
12 lawsuit, isn't it? **15:26:21**

13 MR. JOYCE: That's certainly for  
14 Mr. Felbinger to answer.

15 MR. DEMITRACK: I just thought it was an  
16 odd objection, but, okay.

17 THE WITNESS: You guys lost me, so.... **15:26:31**

18 BY MR. STENERSON:

19 Q Let me -- let me start over. Plaintiff's  
20 Number 9 is the current contract that governs the  
21 reimbursement relationship between Borgess and Blue  
22 Cross; is that right? **15:26:44**

23 A That's correct.

24 Q Let me specifically go to clause Roman XII,  
25 "Favored Discount."

1 A Yes.

2 Q And, again, we'll talk in more detail later **15:26:51**

3 about other issues, but specifically now, sir, I'd like  
4 to ask you, has the favored discount clause in Roman XII  
5 caused Borgess Medical to raise the reimbursement rate  
6 of any commercial payer?

7 MR. LIPTON: Object to the form. **15:27:11**

8 THE WITNESS: No.

9 BY MR. STENERSON:

10 Q Has the favored discount clause in Roman XII  
11 caused Borgess Medical to raise the reimbursement rate  
12 of Aetna? **15:27:20**

13 A No.

14 Q Has the favored discount clause in Roman XII  
15 caused Borgess Medical to raise the reimbursement rate  
16 of United?

17 A No. **15:27:30**

18 Q Has Roman XII, favored discount clause, caused  
19 Borgess Medical to raise the reimbursement rate of  
20 CIGNA?

21 A No.

22 O Has Roman XII, the favored discount clause, **15:27:40**  
23 caused Borgess Medical to raise the rate of Priority?

24 A No.

25 Q Has Roman XII, the favored discount clause,



1 caused Borgess Medical to raise the rate of any  
2 commercial payer doing business in the Kalamazoo area **15:27:57**  
3 whatsoever?

4 A No.

5 Q Has Roman XII, the favored discount clause,  
6 caused Borgess Medical -- or, strike that.

7 Has the favored discount clause prevented **15:28:10**  
8 Borgess Medical from lowering the rate of any commercial  
9 payer that it otherwise wanted to lower?

10 A No.

11 MR. LIPTON: Object to the form.

12 BY MR. STENERSON: **15:28:22**

13 Q Has Roman XII prevented Borgess Medical from  
14 reducing the reimbursement rate at Aetna that it  
15 otherwise wanted to lower?

16 MR. LIPTON: Object to the form,  
17 foundation. **15:28:32**

18 THE WITNESS: I'm sorry?

19 MR. DEMITRACK: What's "reducing" mean in  
20 that context?

21 THE WITNESS: Yeah.

22 BY MR. STENERSON: **15:28:38**

23 Q So let me go back. We went through a series  
24 of questions, and I think your testimony is clear that  
25 the favored discount clause did not cause Borgess

1 Medical to raise the rate to any commercial payer;

2 correct?

15:28:47

3 MR. LIPTON: Object to form.

4 THE WITNESS: It doesn't come into play

5 at all.

6 BY MR. STENERSON:

7 Q That's directionally going up?

15:28:50

8 A Right.

9 Q I want to ask you whether or not the clause  
10 has prevented you from reducing anybody's rates?

11 A No.

12 MR. LIPTON: Object to form and

15:28:59

13 foundation on the question.

14 BY MR. STENERSON:

15 Q And so if I'm correct, your testimony is that  
16 the favored discount clause in Roman XII has not

17 prevented in any way Borgess Medical from reducing a

15:29:08

18 hospital reimbursement rate to any commercial payer; is  
19 that right?

20 MR. LIPTON: Object to the form.

21 THE WITNESS: Lowering --

22 MR. DEMITRACK: "Reducing" means

15:29:18

23 reducing it. I think, my understanding, Mr. Felbinger,

24 he thinks about a reduction of a discount being a

25 raising of a rate.

1 MR. LIPTON: I'm going to object to the  
2 form and foundation on the question. **15:29:28**

3 MR. DEMITRACK: I think you want to use a  
4 word other than "reducing." Lowering the discount?

5 BY MR. STENERSON:

6 Q Would it make more sense to you if we talked  
7 about increasing rate -- increasing discounts? **15:29:39**

8 A That would be more precise, yes.

9 Q Okay. And just so the record's clear, payers  
10 are entering into a contract for the price at which they  
11 will purchase hospital services; correct?

12 A That's correct. **15:29:54**

13 Q So when you think of the Charge Master of, you  
14 know, 100 percent of charges, when a buyer's rate  
15 becomes more favorable to the buyer, you view that as  
16 increasing the payer's discount?

17 A That's correct. **15:30:09**

18 Q Okay. With that foundation and background,  
19 let me ask it this way.

20 Has the Roman XII, the favored discount  
21 clause in Plaintiff's 9, prevented Borgess Medical from  
22 increasing the discount to any commercial payer that **15:30:23**  
23 Borgess Medical otherwise wanted to increase?

24 A No.

25 MR. LIPTON: Object to the form and

1 foundation.

2 BY MR. STENERSON: 15:30:31

3 Q Is there any doubt in your mind about that?

4 A No.

5 MR. LIPTON: Object to the form and  
6 foundation.

7 BY MR. STENERSON: 15:30:35

8 Q Has the favored discount clause prevented  
9 Borgess Medical from increasing the discount it provided  
10 to Aetna for hospital services?

11 MR. LIPTON: Object to the form --

12 THE WITNESS: No. 15:30:42

13 MR. LIPTON: -- and foundation.

14 BY MR. STENERSON:

15 Q Has the favored discount clause prevented  
16 Borgess Medical from increasing the discount it provided  
17 to United for hospital services? 15:30:51

18 A No.

19 Q Has Roman XII, the favored discount provision,  
20 prevented Borgess Medical from increasing the discount  
21 it provided to Priority for hospital services?

22 A No. 15:31:03

23 Q Has Roman XII, the favored discount provision,  
24 prevented Borgess Medical from increasing the discount  
25 to CIGNA for hospital services?

1 A No.

2 Q Has the favored discount in Roman XII caused **15:31:13**  
3 Borgess Medical to terminate the contract of any  
4 commercial payer?

5 A No.

6 Q Has Roman XII, the favored discount provision,  
7 prevented Borgess Medical from entering into any new **15:31:29**  
8 reimbursement contract with a commercial payer that it  
9 otherwise wanted to enter into?

10 A No.

11 MR. LIPTON: Object to the form and  
12 foundation. **15:31:38**

13 BY MR. STENERSON:

14 Q I'm going back one question. Specifically for  
15 Aetna, has the most favored discount clause in Roman XII  
16 prevented Borgess Medical from increasing the discount  
17 it provided to Aetna for hospital services? **15:32:07**

18 A No.

19 MR. LIPTON: Object to the form and  
20 foundation.

21 BY MR. STENERSON:

22 O For all of the answers, sir, that you just **15:32:22**  
23 gave about the favored discount clause, are those  
24 answers true from the period of its first date in effect  
25 through today?

1 A Yes.

2 MR. LIPTON: Object to the form and **15:32:32**  
3 foundation.

4 BY MR. STENERSON:

5 Q In your opinion, sir, has the favored discount  
6 clause in Roman XII -- strike that. Let me withdraw  
7 that. **15:32:51**

8 So earlier you were talking to  
9 Plaintiff's counsel about how you believed volume led to  
10 a higher discount from Borgess's charges for a payer.  
11 Do you recall that?

12 A Yes, I do. **15:33:12**

13 Q You also have talked about through the course  
14 of the day certain strategies that Borgess Medical has  
15 considered and in some cases attempted to cooperate with  
16 other payers to help convert Blue Cross business to a  
17 higher rate. Do you recall that? **15:33:37**

18 A Yes.

19 Q I'd like to talk about that a little bit more  
20 and ask you to look at Plaintiff's Number 3.

21 A I have it.

22 O I'm sorry. I'd actually like to go to **15:33:56**  
23 Plaintiff's 2. PowerPoint number 12. Are you with me?

24 A I'm with you.

25 Q All right. The title of this is

1 never gave them a number. And he kept on saying it, and

2 I felt that I needed to put it in writing to say that's **16:16:16**

3 not what I said.

4 Q Was he just saying it to you or did you get

5 the impression he was saying it to the market?

6 A I believed he was saying it to the market,

7 because earlier on there was one of the exhibits they **16:16:28**

8 talked about someone saying they have somebody else out

9 there at 1 to 3 percent.

10 Q The CIGNA e-mail we were looking at?

11 A Yes. It seemed to me that this was the

12 genesis of that, and I was severely angry about that. **16:16:41**

13 Q And, you know, 2008, fair point, it was

14 several years ago. How -- how certain are you as you

15 sit here today that you never told United Healthcare in

16 the 2008 time frame that they'd get within 5 points of

17 Blue Cross? **16:16:55**

18 A Absolutely, absolutely no way. I mean, just

19 from a business standpoint, I'm not going to let anybody

20 get 10, 15 points, 20 points near Blue Cross. It's not

21 worth it to me for that business.

22 O Did United respond to this letter about your **16:17:08**

23 statements about the 5 percent, that you recall?

24 A You know, I don't recall. I can't remember if

25 they said something in an e-mail or Gretchen might have

1 said something to me on the side.

2 Q Now, in the next sentence you say, "Having **16:17:21**  
3 done so would expose Borgess to a breach of our contract  
4 and I would urge you not to continue making this  
5 statement."

6 A Yes.

7 Q Do you see that? **16:17:30**

8 A Yes.

9 Q Does that refresh your memory in any way  
10 whether or not you believed that United was making those  
11 statements to people other than just Borgess?

12 A I'm not sure that that ties in with that. **16:17:38**  
13 What I was trying to say is the final dot is I can't do  
14 it even by contract, because of the MFN. Even if I  
15 wanted to, which I don't want to do and I never would  
16 want to do, I wouldn't do it even because I have that  
17 contract. That was really just the dotting of the "i" **16:17:54**  
18 because I was very angry about what he continued to say.

19 Q And what would you say if somebody suggested  
20 that that sentence that we just read in Blue Cross 906  
21 should be interpreted to mean that the favored discount  
22 clause in Roman XII of Plaintiff's 9 actually interfered **16:18:09**  
23 with an actual rate that Borgess Medical wanted to  
24 provide to United?

25 MR. LIPTON: Objection to form,



1 foundation.

2 THE WITNESS: The reason is two reasons. **16:18:21**

3 One, from a business standpoint, I wouldn't give that  
4 kind of discount to that player to convert that  
5 business. I just wouldn't do it.

6 Second of all, even if I did, the penalty  
7 there was to lose .005 percent of an update from Blue **16:18:31**  
8 Cross. It's not that big of a deal. I mean, I don't  
9 even want to lose money, but if I had to do it or if  
10 there was some business reason where it would make  
11 absolutely great sense to breach that if I was going to  
12 generate more business that would be brand-new, I'd **16:18:50**  
13 probably do it. So that had nothing to do with that  
14 statement.

15 BY MR. STENERSON:

16 Q You make an interesting point, sir. So let me  
17 ask you this. Set aside the legal interpretation of **16:18:59**  
18 Plaintiff's 9 and what one lawyer may argue and another  
19 will respond.

20 In your mind, being the person with  
21 contracting authority for Borgess Medical during the  
22 pendency of this agreement, did Roman XII, the favored **16:19:15**  
23 discount provision in Plaintiff's 9, affect your  
24 negotiating with any commercial payer whatsoever?

25 A Never --

1 MR. JOYCE: Object --

2 MR. LIPTON: Object to the form and **16:19:28**  
3 foundation.

4 THE WITNESS: I've consistently stated it  
5 was just a throw-in so I could get some additional --  
6 you know, additional rate increases. Never bothered me  
7 at all. Never intended to get anywhere near it. **16:19:38**

8 I'm the one that does decide who I want  
9 to give the discount to, and I wouldn't do it from a  
10 business standpoint getting anywhere near Blue Cross.  
11 The whole idea here is to get everybody, including Blue  
12 Cross, up to the 60, 65 percent realization rate that I **16:19:50**  
13 need.

14 BY MR. STENERSON:

15 Q So if I'm understanding your testimony --

16 A It's a moot point. I mean, I wouldn't use it.  
17 I mean, it never crosses my mind. **16:19:58**

18 Q It's silly?

19 MR. LIPTON: Object to the form.

20 BY MR. STENERSON:

21 Q Do you know what this lawsuit is about?

22 A Yes, I do. **16:20:04**

23 Q What's the lawsuit about?

24 A The most favored nation clause causes harm to  
25 other payers, preventing them to come into the market.

1 Q Okay. And let's -- and you understand that  
2 the Plaintiffs have alleged that specifically the most **16:20:16**  
3 favored discount clause in Roman XII of Plaintiff's 9  
4 has negatively affected commercial payers trying to  
5 compete in Kalamazoo area because of the clause at  
6 Borgess Memorial [sic]. Do you understand that to be an  
7 allegation? **16:20:35**

8 MR. LIPTON: Objection to form,  
9 foundation, and the characterization of the lawsuit.

10 MR. JOYCE: Mischaracterization of the  
11 lawsuit.

12 BY MR. STENERSON: **16:20:47**

13 Q And what's your -- what's your response to  
14 that?

15 A That --

16 MR. LIPTON: Same objections.

17 THE WITNESS: -- in my personal opinion, **16:20:51**  
18 for Borgess Medical Center, since I'm the one that would  
19 decide whether or not I would give a discount that low,  
20 and I know that I wouldn't give that discount that low  
21 because of a business purpose, it hasn't entered  
22 Borgess, Borgess Health, Borgess Medical Center, never **16:21:04**  
23 comes in my mind for that.

24 BY MR. STENERSON:

25 Q And as a result, it hasn't hindered any

1 commercial payers who are attempting to contract with  
2 Borgess Health?

**16:21:14**

3 MR. LIPTON: Objection to form and  
4 foundation.

5 BY MR. STENERSON:

6 Q At Borgess Health?

7 MR. LIPTON: Same objections.

**16:21:17**

8 THE WITNESS: That's true. I mean,  
9 everybody that -- everyone is welcome to come talk with  
10 me, and we freely sign contracts with lots of players,  
11 but it's also based upon their book of business and what  
12 we project their business to be, and it's all based on  
13 ratio.

**16:21:31**

14 If you don't have very much business,  
15 you're going to pay a 65 percent, sometimes 70 percent  
16 realization rate. If you have a ton of business, you  
17 might pay 50 percent. I will never go down below that  
18 knowingly because that jeopardizes our bottom line, and  
19 I just won't do it from a business standpoint.

**16:21:43**

20 Now, others may have different, you know,  
21 situations. My situation at Borgess, with our cost  
22 structure and our array of managed care contracts,  
23 they're there. United could have penetrated if they  
24 chose to put money into -- you know, into the premium.

**16:21:55**

25 BY MR. STENERSON:

1 Q So your bottom line for commercial payers at

2 Borgess Medical is 50 percent of charges?

16:22:11

3 A It's actually north of there.

4 Q And that's without some of these incentive

5 plans we've been talking about?

6 A That's correct.

7 Q But that's an aggregate rate?

16:22:18

8 A That's correct.

9 Q And that's approximately 25 percent higher  
10 than Blue Cross's current rate?

11 A That's correct.

12 MR. LIPTON: Objection to form and

16:22:26

13 foundation.

14 BY MR. STENERSON:

15 Q And has that range been your view since at  
16 least 2007?

17 A We try to keep it in that range, yes.

16:22:32

18 Q And do you expect that view to change in the  
19 next several years?

20 MR. LIPTON: Objection, form.

21 BY MR. STENERSON:

22 O Sav in the next two years?

16:22:39

23 MR. LIPTON: Objection, form.

24 THE WITNESS: I don't think so.

25 BY MR. STENERSON:

1 Q If Blue Cross would have offered in its May  
2 6th proposal, in the favored discount bullet, if it **18:10:45**  
3 would have withdrawn the request for the MFN provision  
4 with the 10 point difference but left the .005 update,  
5 would that offer have been acceptable to Ascension  
6 Health?

7 A No. **18:11:00**

8 Q Why not?

9 A Because it still didn't meet our 13 percent  
10 over three years.

11 Q Do you think that that offer would have still  
12 led to the departicipation card being played later in **18:11:08**  
13 May?

14 A Yes.

15 Q Do you have any doubt in your mind?

16 A No.

17 Q To the extent that .005 percent of an update **18:11:14**  
18 in value is attributable to the MFN provision, are those  
19 moneys that benefited Ascension?

20 MR. LIPTON: Objection, form.

21 THE WITNESS: Yes, they would. Yeah,  
22 they benefit it because we would have gotten more, more **18:11:36**  
23 money.

24 BY MR. STENERSON:

25 Q And how is that a benefit?

1 A More cash in the door is better than less

2 cash. **18:11:44**

3 Q And I think we testified earlier that the --

4 strike that.

5 I think you testified earlier that at

6 least as to the Borgess system, the favored discount

7 provision in Roman XII had no impact whatsoever on any **18:11:56**

8 payer rates at Borgess?

9 A No, it never came into play.

10 MR. LIPTON: Object to the form,

11 foundation.

12 BY MR. STENERSON: **18:12:06**

13 Q And so back to Plaintiff's 5. Am I correct in

14 understanding that -- well, strike that.

15 Did Dr. Maryland ever tell you who from

16 Blue Cross talked to Mr. Tersigni?

17 A I don't believe -- I don't believe I knew. I **18:12:20**

18 suspected it would be Dan Loepp, the President, because

19 he had a personal relationship with Tony Tersigni, but

20 that's just pure speculation.

21 Q You don't know that?

22 A I don't know that for a fact. **18:12:36**

23 Q The "Super deal!!!!" at the bottom of 5,

24 again, am I correct in understanding that was completely

25 facetious?

1 A That is completely facetious.

2 Q You did not think that the agreement embedded **18:12:47**  
3 in Plaintiff's 9 between Ascension Health and Blue Cross  
4 was a super deal?

5 A It was not sufficient based upon all of our  
6 discussion over the last -- the previous year, year and  
7 a half, of what our requirements were for Blue Cross to **18:13:01**  
8 meet our 5 percent operating margin.

9 Q And when you say it's not sufficient, you mean  
10 the -- all the payments --

11 A All of the payments.

12 Q -- in 9? **18:13:11**

13 A Were below what we required -- we were  
14 requiring from Blue Cross to meet our objectives.

15 Q So let me show you...can you go back, I'm  
16 sorry, to the Borgess termination letter.

17 A That would be Exhibit 9? **18:13:47**

18 Q So Blue Cross 910.

19 A Blue Cross 910, yes.

20 Q And, I'm sorry, how do you pronounce your  
21 CEO's name?

22 A Spaude. **18:14:00**

23 Q Do you see where Mr. Spaude writes, "When Blue  
24 Cross is willing to negotiate in good faith, Borgess,  
25 with the Ascension Health negotiating team, shall again



**EXHIBIT 10**  
**Filed Under Seal**

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

```

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

```

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

```

-----:
AETNA INC.,                   :
                                :
                                :   Civil Action No.:
                                :
                                :   2:11-cv-15346-DPH-MKM
BLUE CROSS BLUE SHIELD OF     :
MICHIGAN,                     :
                                :
Defendant.                     :
-----:

```

Detroit, Michigan

Tuesday, October 30, 2012

Confidential Video Deposition of:

MARK JOHNSON,

was called for oral examination by counsel for Plaintiff, pursuant to Notice, at Bodman PLC, 1901 St. Antoine Street, 6th Floor at Ford Field, Detroit, Michigan, before Michele E. French, RMR, CRR, of Capital Reporting Company, a Notary Public in and for the State of Michigan, beginning at 9:18 a.m., when were present on behalf of the respective parties:

1 Q And I'd like to ask you about the "Payor Mix"

2 row. 15:56:59

3 A Yes.

4 Q And it's row number 2 on Exhibit 18. Do you  
5 see that "Priority (Preferred Choices)" entry in column  
6 G?

7 A Yes. 15:57:11

8 Q Do you agree with me that it shows that  
9 Priority/Preferred Choice's payer mix is above 1.2  
10 percent?

11 A No.

12 Q Okay. What do you see? 15:57:20

13 A I see that it's equal to 1.2 percent.

14 Q Thank you for the clarification.

15 You agree with me that it's above 1.0  
16 percent --

17 A Yes. 15:57:34

18 Q -- correct?

19 A 1.2 is larger than 1.0. That's correct.

20 Q Fair enough. Thank you for the clarification.

21 So is it fair to say that the payer mix  
22 for Priority exceeded the de minimis provision that is 15:57:47  
23 contained in the most favored discount clause?

24 A Let me re-read the discount clause.

25 Q Sure.

1           A       (Reviewing Johnson Exhibit 15.) I will agree  
2 that 1.2 is larger than 1.0. I will not necessarily 15:58:47  
3 agree that the fact on Exhibit 18, under column G, row  
4 2, that that presence of that statistic on Exhibit 18 is  
5 a violation of the most favored discount in Exhibit 15.

6           Q       To be clear, that was not my question.

7                       Was Priority above the de minimis 15:59:14  
8 exception that was contained in the most favored  
9 discount provision?

10          A       I do not know.

11          Q       Okay. And how would you have figured that  
12 out, if you wanted to? 15:59:26

13          A       I would have had to interpret what this meant  
14 in Exhibit 15, what 1 percent meant in Exhibit 15. I  
15 would have to answer questions about when, beginning,  
16 middle, end. It's not clear from the most favored  
17 discount clause the answer to those questions. 15:59:50

18                       So if challenged by Blue Cross, in  
19 violation of this clause, I would have worked very hard  
20 to dispute their assertion that I violated. That never  
21 occurred, so it's a hypothetical.

22          Q       To your knowledge, any time after you signed 16:00:08  
23 the LOU that is contained in Exhibit 15, did Beaumont  
24 Hospital raise Priority's reimbursement rates?

25          A       Any time after the signing of this?

1 Q After you signed the LOU contained in Exhibit

2 15. 16:00:34

3 MR. STENERSON: Object to the form.

4 BY MR. TORZILLI:

5 Q To your knowledge.

6 A I can say this: To my knowledge, Beaumont, in  
7 reaction to any dispute by Blue Cross, in violation of 16:00:55  
8 this provision on Exhibit 15, most favored nation, that  
9 Beaumont did not go back to any payer, let alone  
10 Priority, and raise its reimbursement rate.

11 Q Did you leave the employment of Beaumont in  
12 approximately September 2010? 16:01:26

13 A I did.

14 Q Do you know whether any time after September  
15 2010 Beaumont raised Priority's reimbursement rates?

16 MR. STENERSON: Object to the form.

17 THE WITNESS: I would not know that. 16:01:35

18 BY MR. TORZILLI:

19 Q Do you know who succeeded you in your position  
20 at Beaumont Hospital?

21 A Doug Darland.

22 Q Doug Darland succeeded you at Beaumont 16:01:43  
23 Hospital?

24 A That's correct.

25 Q Is he currently in the role that you were in

**EXHIBIT 13**  
**Filed Under Seal**

DAVID MARCELLINO  
September 6, 2012

Page 1

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al,

Plaintiffs,

vs.

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

BLUE CROSS BLUE SHIELD

OF MICHIGAN,

Defendant.

---

The Videotaped Deposition of DAVID MARCELLINO,  
Taken at 28050 Grand River Avenue,  
Farmington Hills, Michigan,  
Commencing at 9:25 a.m.,  
Thursday, September 6, 2012,  
Before Lezlie A. Setchell, CSR-2404, RPR, CRR.

DAVID MARCELLINO  
September 6, 2012

Page 73

1 strategy.

2 BY MR. STENERSON:

3 Q. What do you mean by that?

4 A. Most favored nation, Blue Cross had the, had probably  
5 the greatest discount because of the volume that they  
6 provided and the history behind how Blue Cross  
7 reimbursed through the PHA, okay, the PHA being the  
8 governing document for Michigan hospitals, okay. I  
9 meant that what I'm saying is is that we did not  
10 specifically -- most of our -- all of our -- most of  
11 our negotiations with Blue Cross were never around the  
12 most favored nations. It was around the price in  
13 terms of our agreement in terms of how or what we were  
14 going to be paid, okay. It did not -- understand that  
15 going back to our philosophy was to get the best price  
16 from all payers. So we try to get a price as -- that  
17 was higher than Blue Cross, frankly. We sent -- my  
18 philosophy was Blue Cross was the floor under which we  
19 would negotiate for other payers.

20 Q. When you say your philosophy is Blue Cross was the  
21 floor, that's completely unrelated to any most favored  
22 nations clause?

23 A. Yes, nothing related to favored, now ----

24 Q. You said nothing related to the Blue Cross most  
25 favored nations clause?



DAVID MARCELLINO  
September 6, 2012

Page 74

1 A. You know, most favored nation clause, I'm aware of  
2 only one instance where it actually came up as an  
3 issue and it was raised by Blue Cross, not by us. We  
4 actually objected to it and would as soon have it not  
5 even in the agreement. So it was kind of like if we  
6 want to have an agreement, we -- Blue Cross felt that  
7 it had to be in there. We didn't view it as  
8 enforceable, and it certainly didn't guide our  
9 practice in terms of how we negotiated with other  
10 payers.

11 Q. Okay. So let me go back and make sure I understand.  
12 First, you mentioned that the Blue Cross most favored  
13 nations provision you said did not govern your  
14 negotiations, correct?

15 A. Did not.

16 Q. Was that a reference to your negotiations with Blue  
17 Cross or with other payers?

18 A. Both.

19 Q. Let's talk about Blue Cross.

20 A. We try to get the most out of Blue Cross as well  
21 because, you know, and so it was the philosophy in  
22 terms of getting the most out of every nongovernment  
23 payer was consistent throughout.

24 Q. And then as your statement that the Blue Cross most  
25 favored nations provision did not govern your

DAVID MARCELLINO  
September 6, 2012

Page 75

1 negotiations with other payers, I want to talk about  
2 that, okay?

3 A. Absolutely not. Never has.

4 Q. And if I understand, it's because you had a philosophy  
5 at Botsford since at least 1989 that separate and  
6 apart from any most favored nations provision, you  
7 weren't going to give a rate below Blue Cross to  
8 anybody?

9 MR. MATHESON: Objection to form.

10 BY MR. STENERSON:

11 Q. Strike that. You had a philosophy that the Blue Cross  
12 rate should be the floor rate separate and apart from  
13 any most favored nations provision; is that correct?

14 A. That's correct, that was my philosophy.

15 Q. And again, can you just explain briefly why your  
16 philosophy was that nobody should get a rate below  
17 Blue Cross separate and apart from any most favored  
18 nations provision?

19 A. Again, Blue Cross was the largest commercial payer who  
20 provided the largest volume to our organization, and  
21 therefore, based upon the philosophy and what I  
22 explained earlier is the fact that volume justifies  
23 discounts.

24 Q. And am I correct in understanding, therefore, that any  
25 provision in the Botsford/Blue Cross agreement that

DAVID MARCELLINO  
September 6, 2012

Page 76

1 someone might consider a most favored nations clause  
2 did not affect the rate that Botsford agreed to with  
3 any other commercial payer?

4 MR. MATHESON: Object to the form.

5 A. It did not enter into any of the negotiations that we  
6 had with any payer while I was CFO.

7 BY MR. STENERSON:

8 Q. So -- so I'm clear, it's your testimony that while you  
9 were CFO, any provision in the Botsford/Blue Cross  
10 agreement that's considered a most favored nations  
11 provision did not enter into any negotiations that  
12 Botsford had with HAP, correct?

13 MR. MATHESON: Object to foundation.

14 MR. TORZILLI: Object to form.

15 A. That's correct.

16 BY MR. STENERSON:

17 Q. And that clause also did not enter into any  
18 negotiations that Botsford had with Aetna?

19 MR. MATHESON: Object, foundation.

20 MR. TORZILLI: Same objection.

21 A. That's correct.

22 BY MR. STENERSON:

23 Q. And I'm also correct that any clause in a  
24 Botsford/Blue Cross agreement that's considered a most  
25 favored nations provision did not enter into any

DAVID MARCELLINO  
September 6, 2012

Page 77

1 negotiation that Botsford had with any commercial  
2 payer?

3 A. That's correct.

4 MR. TORZILLI: Same objection.

5 BY MR. STENERSON:

6 Q. When you say did not enter into the negotiation, do  
7 you mean by that it had no effect, whatsoever, on the  
8 rate that Botsford was willing to agree to with any  
9 commercial payer?

10 MR. MATHESON: Object to foundation and  
11 form.

12 A. That's correct.

13 BY MR. STENERSON:

14 Q. Is it your opinion, therefore, that the Blue Cross  
15 most -- strike that.

16 Is it your opinion, therefore, that any  
17 clause in a Botsford/Blue Cross agreement that's  
18 considered a most favored nations clause did not cause  
19 any commercial payer to pay Botsford more than it  
20 otherwise would have paid for hospital services?

21 MR. MATHESON: Objection to foundation and  
22 form.

23 MR. TORZILLI: Object to form.

24 A. If I understand you, the answer is is that if -- could  
25 you rephrase that when you said do not, double

DAVID MARCELLINO  
September 6, 2012

Page 78

1 negative?

2 BY MR. STENERSON:

3 Q. Sure. So the allegations in this case are that  
4 clauses that are considered to be most favored nations  
5 provisions have caused commercial competitors of Blue  
6 Cross to pay more to hospitals for hospital services,  
7 okay, and my question is: To the extent there's a  
8 clause in any Botsford/Blue Cross agreement, do you  
9 agree with me that any such clause did not cause any  
10 commercial payer to pay Botsford a higher rate for  
11 hospital services?

12 MR. MATHESON: Object, foundation.

13 MR. TORZILLI: Objection.

14 A. Yes.

15 BY MR. STENERSON:

16 Q. Is there any doubt in your mind?

17 A. No doubt in my mind.

18 Q. And why are you so certain?

19 A. I can go back to the philosophy that on a  
20 contract-by-contract basis, we try to get the highest  
21 price that we can negotiate in the interest of the  
22 organization. In order to be able to maintain the  
23 viability of the organization, we had to take that  
24 philosophy.

25 MR. STENERSON: I'm going to show you a

DAVID MARCELLINO  
September 6, 2012

Page 79

1 document.

2 MARKED FOR IDENTIFICATION:

3 BLUE CROSS MARCELLINO EXHIBIT 951

4 11:12 a.m.

5 BY MR. STENERSON:

6 Q. Sir, I'm going to hand you what's been marked as Blue  
7 Cross 951 and ask you to take a look at it.

8 Have you had a chance to look at Blue Cross  
9 951?

10 A. I'm reading through it now.

11 Q. Okay. Please take your time.

12 A. Okay.

13 Q. Have you seen Blue Cross 951 before?

14 A. This was a letter signed by -- in 2007. I do -- I do  
15 vaguely remember seeing this, this letter, yes.

16 Q. And you see on the bottom bullet -- well, strike that.

17 Blue Cross 951 is dated November 14, 2007;  
18 is that right?

19 A. Yeah.

20 Q. From Blue Cross to Botsford's CEO, correct?

21 A. Yes, that's correct.

22 Q. And do you -- do you recognize Mr. LaCasse's signature  
23 on the second page?

24 A. Yes.

25 Q. And do you believe that to be his signature?

DAVID MARCELLINO  
September 6, 2012

Page 80

1 A. Yes, it is.

2 Q. And the last bullet on the page says BH. Do you know  
3 if that's a reference to Botsford?

4 A. Yes, it is.

5 Q. It says: Botsford attests that the discount provided  
6 to BCBSM is greater than the discount offered to any  
7 other commercial insurer and that the relative  
8 discount given to BCBSM is commensurate with the  
9 volume of business BCBSM represents at Botsford.

10 Is that correct?

11 A. Yes, that's correct, that's what it says.

12 Q. Is that statement consistent with the contracting  
13 philosophy that you explained Botsford had at this  
14 time?

15 MR. DULWORTH: I just object to the form.

16 A. It's consistent with -- it's consistent with our  
17 philosophy. Blue Cross would enjoy the greater  
18 discount because they had the greatest volume.

19 BY MR. STENERSON:

20 Q. And do you believe -- strike that.

21 At the time in 2007, did you believe that  
22 the statement I just read required Botsford to do  
23 anything in the future?

24 A. I'm not sure what you mean by "do anything in the  
25 future".

DAVID MARCELLINO  
September 6, 2012

Page 81

1 Q. Fair enough. In your opinion, does the last bullet  
2 require that Botsford continue to give Blue Cross the  
3 best rate?

4 MR. MATHESON: Objection to foundation.

5 A. Again, I go back to the fact that, that it was in our  
6 best interest to, again, provide discounts starting  
7 from the premise that I would prefer not to provide  
8 any discounts, okay?

9 BY MR. STENERSON:

10 Q. 100% of charges?

11 A. Okay, 100% of charges and we could be a much more --  
12 we would be a wonderful institution if that was the  
13 case. But the thing of it -- and frankly, our charges  
14 could be a lot lower, by the way. But the thing of it  
15 is is that it's based upon volume, and this particular  
16 provision was something that was insisted upon by Blue  
17 Cross but did not, did not guide our negotiations with  
18 anyone else, but again, volume drove discounts. So we  
19 would be negotiating against the best interest -- we  
20 would be proceeding against the, the -- in any other  
21 negotiations that were contrary to the best interest  
22 of the organization.

23 Q. Do I understand your testimony correctly, you said you  
24 would have been proceeding in the interest contrary to  
25 the best interest of Botsford if you were to provide a



DAVID MARCELLINO  
September 6, 2012

Page 82

1 rate lower than Blue Cross to anyone?

2 A. That is correct.

3 Q. And you wouldn't intentionally do that?

4 A. No.

5 Q. I'm correct?

6 A. No, I would not intentionally negotiate a rate lower  
7 than Blue Cross.

8 Q. With any other commercial payer?

9 A. -- with any other commercial payer, payer.

10 Q. And that was true during your entire period of time as  
11 CFO?

12 A. That's correct.

13 Q. And that's true regardless of however one interprets  
14 the last bullet on 951?

15 MR. TORZILLI: Object to form.

16 A. Right.

17 BY MR. STENERSON:

18 Q. Is that correct?

19 A. That's correct.

20 MARKED FOR IDENTIFICATION:

21 BLUE CROSS MARCELLINO EXHIBIT 952

22 11:18 a.m.

23 BY MR. STENERSON:

24 Q. Let me show you what's been marked as 952 and ask you  
25 to take a moment to review that.

DAVID MARCELLINO  
September 6, 2012

Page 83

1 A. Okay.

2 Q. Have you had an opportunity to review 952?

3 A. Yes, I did.

4 Q. Is Blue Cross 952 dated December 18th, 2009?

5 A. Yes, it is.

6 Q. It's a letter from Blue Cross to Botsford's CEO; is  
7 that right?

8 A. Yes.

9 Q. And again, do you recognize Mr. LaCasse's signature?

10 A. Yes.

11 Q. Do you believe that to be an accurate signature?

12 A. Yes.

13 Q. Now this, this letter, Blue Cross 952, has similar  
14 language on the last bullet on the second page; do you  
15 see that?

16 A. Yes.

17 Q. Are all your answers that applied to your  
18 interpretation and views of the last bullet on 951  
19 apply to the same language in 952?

20 A. Yes.

21 MR. TORZILLI: Object to form.

22 BY MR. STENERSON:

23 Q. Was any commercial payer's rate at Botsford in your  
24 view affected in any way by the last bullet on 952?

25 MR. MATHESON: Object to foundation and

DAVID MARCELLINO  
September 6, 2012

Page 84

1 form.

2 A. No.

3 BY MR. STENERSON:

4 Q. Okay, and that's the clause that Botsford attested  
5 that the discount provided by -- strike that.

6 The last bullet on Blue Cross 952 states:  
7 Botsford attests that the discount provided to BCBSM  
8 is greater than the discount offered to any other  
9 commercial insurer and that the relative discount  
10 given to BCBSM is commensurate with the volume of  
11 business BCBSM represents at Botsford.

12 Correct?

13 A. Correct.

14 Q. Do you believe that while you were CFO, that clause  
15 affected in any way the payment rate that other  
16 commercial payers received at Botsford?

17 MR. MATHESON: Objection to foundation.

18 A. No.

19 BY MR. STENERSON:

20 Q. Are you certain?

21 A. I'm certain.

22 Q. And why are you so certain?

23 A. Because, again, it never entered into our negotiations  
24 as a driving force behind our negotiations. We tried  
25 to get the best price from everyone, including Blue

DAVID MARCELLINO  
September 6, 2012

Page 85

1 Cross.

2 Q. How would you describe Blue Cross as a negotiator?

3 A. I would say that as a negotiator, they are -- I would  
4 say they are a fair negotiator. I mean, I think they  
5 keep, because of the size of their business and the,  
6 and the impact on the viability of the healthcare  
7 delivery system, I think they're more open to  
8 suggestions to help hospitals maintain themselves from  
9 a viability perspective, but I would say that they're  
10 recent times -- you understand that what we're  
11 negotiating is just basically amendments to the basic  
12 agreement --

13 Q. Right.

14 A. -- the participating hospital agreement, so they've  
15 been flexible and willing but also, also -- also, you  
16 know, I would say tough negotiators as well.

17 Q. How in your view does their flexibility in order to  
18 help maintain -- strike that.

19 How does their openness to listen to  
20 hospitals and help maintain hospital viability affect  
21 healthcare?

22 MR. MATHESON: Objection to  
23 characterization.

24 BY MR. STENERSON:

25 Q. Strike that. Let me read back your answer. My

DAVID MARCELLINO  
September 6, 2012

Page 110

1 12:02 p.m. This marks the end of tape number two. We  
2 are off the record.

3 (Lunch recess taken at 12:02 p.m.)

4 (Back on the record at 12:23 p.m.)

5 VIDEO TECHNICIAN: We are back on the  
6 record. The time is 12:23 p.m. This marks the  
7 beginning of tape number three.

8 BY MR. STENERSON:

9 Q. Sir, a couple more questions about Blue Cross 951, the  
10 November 14, 2007 letter agreement between Botsford  
11 and Blue Cross. Directing your attention, again, to  
12 the last bullet where it says, Botsford attests that  
13 the discount; are you there with me?

14 A. Yes, I am.

15 Q. Did that clause in Blue Cross 951 prevent Botsford  
16 from reaching any managed care agreement with any  
17 commercial payer?

18 A. No.

19 Q. Did that clause in 951 cause Botsford to terminate any  
20 managed care agreement with any commercial payer?

21 A. No.

22 Q. On Blue Cross 952, same clause, last bullet, Botsford  
23 attests that the discount provided to Blue Cross Blue  
24 Shield of Michigan is --

25 A. Excuse me, 952? I'm looking for 952.

DAVID MARCELLINO  
September 6, 2012

Page 111

1 Q. Yes, sir.

2 A. Do I have that?

3 Q. The December 18th, 2009 letter.

4 A. I have 955, 953, 951, 954. I don't have 952. Which  
5 one is it?

6 Q. The December 18, 2009 letter agreement --

7 A. Oh, okay -- excuse me, I'm sorry -- okay, on the top.  
8 I was looking for it on the bottom.

9 Q. No problem.

10 A. Okay.

11 Q. So you've got Blue Cross 952?

12 A. Yes, I do.

13 Q. And do you see the bullet: Botsford attests that the  
14 discount provided to Blue Cross Blue Shield of  
15 Michigan is greater than the discount offered to any  
16 other commercial insurer and that the relative  
17 discount given to Blue Cross Blue Shield of Michigan  
18 is commensurate with the volume of business Blue Cross  
19 Blue Shield represents at Botsford.

20 Do you see that?

21 A. Yes, I do.

22 Q. Did that clause in Blue Cross 952 cause Botsford to  
23 terminate any managed care agreement that it had with  
24 any other commercial payer?

25 A. No.

DAVID MARCELLINO  
September 6, 2012

Page 112

1 Q. Did that clause in Blue Cross 952 interfere with or  
2 prevent -- strike that -- interfere with or prevent  
3 Botsford from entering into any managed care agreement  
4 with any commercial payer?

5 A. No.

6 Q. Do you know if that language currently exists in any  
7 agreement between, effective agreement between Blue  
8 Cross and Botsford?

9 A. I do not know specifically because I -- but I believe  
10 it probably still -- I'm assuming it's still there.

11 Q. I don't want you to assume.

12 A. Okay. I don't know for sure. I don't know.

13 Q. Were you involved in any discussions in 2011 or 2012  
14 to remove any language related to that?

15 A. No, no.

16 Q. I think you mentioned earlier you were involved with  
17 some discussions and negotiations with United  
18 Healthcare; is that right?

19 A. Yes.

20 MARKED FOR IDENTIFICATION:

21 BLUE CROSS MARCELLINO EXHIBIT 956

22 12:26 p.m.

23 BY MR. STENERSON

24 Q. Let me show you what's been marked as Blue Cross 956.

25 A. Okay.

DAVID MARCELLINO  
September 6, 2012

Page 113

1 Q. Who is Martin?

2 A. Martin Skrzynski reported to me. He was director of  
3 financial planning and contracting before he was --  
4 he's still with us but before he was reassigned --  
5 assigned to our ambulance affiliate, and then that's  
6 when Terry took over the role.

7 Q. So he was in the role prior to Mr. Slavin?

8 A. Yes, yes.

9 Q. And this is dated in the spring of 2006, this email  
10 chain, correct?

11 A. Yes.

12 Q. And you're copied on it?

13 A. Yes, I was.

14 Q. And is this an example of where you were involved with  
15 negotiations related to United Healthcare's  
16 reimbursement contract with Botsford?

17 A. Again, I was not directly involved in the negotiation,  
18 but I was copied and informed by Marty as to the  
19 progress of the negotiations.

20 Q. And do you see on the second page where Marty tells  
21 United: In the absence of a significant increase in  
22 United Healthcare volume, we consider our October rate  
23 proposal the best compromise we can offer?

24 A. Yes.

25 Q. Is that consistent with the policy you stated that



DAVID MARCELLINO  
September 6, 2012

Page 133

1 that earlier today?

2 A. Yes.

3 Q. And in Blue Cross -- in Blue Cross Exhibit 951 --

4 MR. STENERSON: I'm sorry, Paul, why  
5 doesn't the witness have the exhibits?

6 MR. TORZILLI: Because I do.

7 MR. STENERSON: Oh.

8 MR. TORZILLI: He has the exhibit we're now  
9 talking about.

10 MR. STENERSON: Okay. Not standard  
11 practice in this case or any other dep I've been in  
12 but that's okay.

13 MR. TORZILLI: It's certainly been the  
14 standard in the ones I've been involved in.

15 BY MR. TORZILLI:

16 Q. Is there a most favored discount provision in Blue  
17 Cross Exhibit 951?

18 MR. DULWORTH: Form and foundation.

19 MR. STENERSON: Join.

20 A. Well, there is a -- the last bullet point that was  
21 talked about earlier does have some language to that,  
22 to that effect based upon my interpretation which  
23 again, I'm not an attorney.

24 BY MR. TORZILLI:

25 Q. Sure. Excuse me. And I believe your testimony

DAVID MARCELLINO  
September 6, 2012

Page 134

1 earlier today was that it, that provision had  
2 essentially no impact or relationship on any  
3 negotiations that Botsford had with any commercial  
4 payer --

5 A. Yes.

6 Q. -- other than Blue Cross; is that correct?

7 A. That's correct.

8 Q. Okay. Did the provision that is in the fourth bullet  
9 point of Blue Cross 951 have any impact or  
10 relationship on any other aspect of the operations of  
11 Botsford Hospital?

12 A. No.

13 Q. Can you think of any benefits to Botsford Hospital of  
14 the language contained in the fourth bullet point in  
15 Blue Cross 951?

16 MR. STENERSON: Object to the form.

17 A. I can think of no benefit.

18 BY MR. TORZILLI:

19 Q. Okay. And did, because of the provision contained in  
20 the fourth bullet point of Blue Cross 951, did you  
21 lower any commercial payer's reimbursement rates?

22 A. No.

23 Q. I may have heard you incorrectly, but did you say  
24 earlier today that you viewed this provision as  
25 unenforceable?

DAVID MARCELLINO  
September 6, 2012

Page 135

1 A. That's my personal opinion, okay, because it's not  
2 really based in any sense of reality in terms of how  
3 hospitals must operate in the marketplace.

4 Q. Can you explain a little bit more what you mean by  
5 that?

6 A. Going back to what I said before, in terms of being  
7 able to, to maintain the viability of the institution,  
8 be able to invest in capital future, to be able to  
9 renew the capital, be able to cover all your costs.  
10 You have to have an adequate level of revenue from all  
11 payers across the board. It does you no good, and in  
12 this particular market, 75 to 80% is dominated by  
13 three major players. So to a large extent there's no  
14 economic incentive to basically discount below your  
15 largest payer because all you're doing is lowering  
16 your bottom line.

17 Q. If it were to occur that someone would order, a Court  
18 would order that the provision contained in the fourth  
19 bullet point of 951 were, were null and void, would  
20 you be opposed to such a ruling?

21 MR. STENERSON: Object to the form,  
22 completely inappropriate question.

23 A. I would not be opposed to it.

24 BY MR. TORZILLI:

25 Q. Okay. You can put the exhibit aside.

DAVID MARCELLINO  
September 6, 2012

Page 278

1 A. No, I was not directly involved.

2 Q. Do you know if Blue Cross made the provision that  
3 reimbursement discounts should reflect market share a  
4 precondition of the \$50,000,000 payment?

5 MR. STENERSON: Object to the form.

6 A. I don't believe -- I don't believe it was a  
7 precondition, no. I believe that the, the acceptance  
8 of the revised Blue Cross contracting principles in  
9 the new model for reimbursement for determination of  
10 Blue Cross rates was the, was the basis for the  
11 \$50,000,000 payment, not, not that provision.

12 BY MR. MATHESON:

13 Q. So do you think that the sentence on the first page of  
14 this document that says, In order to retain the  
15 payment, your facility must agree to contracts  
16 participating hospital under our revised reimbursement  
17 model in addition to several of the key elements of  
18 the model mentioned above, the other primary  
19 principles of our model as shown on the enclosed  
20 attachment, do you believe that the BCBSM  
21 reimbursement discount is not one of the primary  
22 principles of the model that's referred to in that  
23 sentence?

24 MR. STENERSON: Object to the form.

25 A. I believe it is one of the principles, but I don't

DAVID MARCELLINO  
September 6, 2012

Page 279

1 think it's the controlling principle.

2 BY MR. MATHESON:

3 Q. But in order to retain payment, this letter states  
4 that the hospitals must agree to the other primary  
5 principles; is that right?

6 A. That's, that's basically what it says. I mean, we  
7 agree to principles. This is something that was  
8 negotiated between the hospitals and Blue Cross, but  
9 individual hospitals had to agree to it, but it was  
10 part of the overall negotiations.

11 MR. MATHESON: That's all I have, sir.  
12 Thank you very much.

13 THE WITNESS: Okay.

14 MR. STENERSON: I just have a handful.  
15 I'll just sit right here.

16 RE-EXAMINATION

17 BY MR. STENERSON:

18 Q. Counsel for Aetna just asked you a series of questions  
19 about what individual negotiators may have said to  
20 commercial payers in negotiations; do you recall that?

21 A. Uh-huh.

22 Q. Am I correct in understanding your testimony earlier,  
23 sir, that your philosophy and your instruction to the  
24 negotiators was, Don't give anybody below the Blue  
25 Cross rate, correct?

DAVID MARCELLINO  
September 6, 2012

Page 280

1 MR. MATHESON: Objection to the instruction  
2 portion of the question, misstates the testimony.

3 BY MR. STENERSON:

4 Q. Is my statement correct?

5 A. That's -- that was my general principle, and I  
6 remember saying that to individuals.

7 Q. So to the extent there was a negotiation and a payer  
8 like Aetna or United heard a Botsford representative  
9 say something along the lines of, I can't give you a  
10 rate below Blue Cross's --

11 A. Then that was based upon Blue Cross volume of course.

12 Q. Right. Well, that's my question. It had nothing to  
13 do with the bullets in 951 or 952 --

14 MR. MATHESON: Objection, no foundation.

15 BY MR. STENERSON:

16 Q. -- is that correct?

17 A. That's right.

18 BY MR. STENERSON:

19 Q. That's just your philosophy?

20 A. That's right.

21 MR. STENERSON: Nothing further.

22 MR. TORZILLI: Nothing further.

23 MR. BRESSACK: Nothing further.

24 VIDEO TECHNICIAN: This concludes today's  
25 deposition. The time is 5:04 p.m. We are off the

DAVID MARCELLINO  
September 6, 2012

Page 281

1 record.

2 (The deposition was concluded at 5:04 p.m.  
3 Signature of the witness was not requested by  
4 counsel for the respective parties hereto.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

**EXHIBIT 14**  
**Filed Under Seal**



MARK GRONDA  
December 13, 2012

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION  
4  
5 UNITED STATES OF AMERICA, et al,  
6 Plaintiffs,  
7 vs. Case No. 2:10-cv-14155-DPH-MKM  
8  
9 BLUE CROSS BLUE SHIELD  
10 OF MICHIGAN,  
11 Defendant.

12 \_\_\_\_\_

13  
14  
15 The Confidential Videotaped Deposition of  
16 MARK GRONDA,  
17 Taken at 4960 Towne Centre Road,  
18 Saginaw, Michigan,  
19 Commencing at 10:08 a.m.,  
20 Thursday, December 13, 2012,  
21 Before Rebecca L. Russo, CSR-2759, RMR, CRR.

22  
23  
24  
25

MARK GRONDA  
December 13, 2012

Page 51

1 VIDEO TECHNICIAN: The time is now  
2 11:15 a.m. This marks the end of tape number one. We  
3 are off the record.

4 (Off the record at 11:15 a.m.)

5 (Back on the record at 11:24 a.m.)

6 VIDEO TECHNICIAN: We are back on the  
7 record. The time is 11:24 a.m.

8 BY MR. GLENDE:

9 Q. Mr. Gronda, I'm handing you what's been marked as  
10 Gronda Exhibit Number 2, which reminds me that we  
11 never talked about Exhibit Number 1.

12 MARKED FOR IDENTIFICATION:  
13 GRONDA DEPOSITION EXHIBIT 2  
14 11:25 a.m.

15 BY MR. GLENDE:

16 Q. So before you look at Number 2, let's look at  
17 Number 1.

18 A. This is 1.

19 Q. Yeah, Exhibit Number 1 is the protective order in this  
20 case. Have you had a chance to review that with your  
21 attorney?

22 A. Yes.

23 Q. And if you turn to the last page, that is your  
24 signature there on the bottom of the last page?

25 A. Yes, it is.

MARK GRONDA  
December 13, 2012

Page 52

1 Q. All right, thank you. If you would now turn to  
2 Exhibit Number 2, a document with the Bates number 500  
3 at the bottom. Do you recognize Exhibit Number 2?

4 A. Yes, I do.

5 Q. And what is it?

6 A. It's a letter of understanding amendment to the PHA  
7 with Blue Cross.

8 Q. And if you turn to the last page, which is 506, is  
9 that your signature on page 506?

10 A. Yes, it is.

11 Q. And a representative of Blue Cross signed there, as  
12 well?

13 A. Yes.

14 Q. Okay. You said that Exhibit 2 is an amendment to the  
15 PHA. What's the PHA?

16 A. Participating hospital agreement. It's a standard  
17 document that Blue Cross uses as a starting point for  
18 negotiations.

19 Q. And is this LOU, Exhibit 2, is it still in force  
20 today?

21 A. It is. As I said, it expired 6-30 of '12, but the  
22 rates had an evergreen clause, so those rates have  
23 continued.

24 Q. How about the other terms of the LOU, is it your  
25 understanding that those continue, as well?

MARK GRONDA  
December 13, 2012

Page 53

1 A. Yes.

2 MR. STENERSON: Object to the form.

3 A. Yes.

4 BY MR. GLENDE:

5 Q. Are you currently negotiating any new LOU with Blue  
6 Cross?

7 A. I am attempting. I sent them a letter and I followed  
8 it up with an email, and I actually received a phone  
9 call yesterday to contact them to set up an initial  
10 meeting. But we've not had any face-to-face  
11 discussions or even telephone conversations at this  
12 point.

13 Q. All right. And did you handle the negotiations on  
14 behalf of Covenant relating to Exhibit Number 2?

15 A. I did.

16 Q. When did you begin negotiations that led to this  
17 letter of understanding?

18 A. Probably close to a year prior to this date. It was a  
19 long process.

20 Q. The LOU is signed on December 23rd, 2009?

21 A. Correct.

22 Q. And so sometime in 2000 -- end of 2008 is when the  
23 negotiations started?

24 A. Yeah, I would say early '09 or late '08 was when we  
25 made the first overtures.

MARK GRONDA  
December 13, 2012

Page 81

1 A. Let me just read it for a second. I believe it's  
2 included. I don't ever recall any discussions where  
3 there was going to be an exclusion from that  
4 negotiated LOU.

5 Q. And do you know how the trust reimbursement was  
6 determined before the LOU?

7 A. No.

8 Q. And did you understand that the MFN was a necessary  
9 part of getting the rate, getting the rates that are  
10 in the LOU?

11 MR. STENERSON: Object to the form.

12 A. Yes.

13 BY MR. GLENDE:

14 Q. And those rates are higher than what Covenant would  
15 have gotten absent the LOU?

16 MR. STENERSON: Object to the form.

17 A. Yes.

18 BY MR. GLENDE:

19 Q. Did anyone at Blue Cross indicate it would be willing  
20 to pay more with the MFN included in the LOU?

21 MR. STENERSON: Object to the form.

22 A. Can you repeat that?

23 BY MR. GLENDE:

24 Q. Did anyone at Blue Cross indicate that Blue Cross  
25 would be willing to pay more with the MFN included in

MARK GRONDA  
December 13, 2012

Page 82

1 the LOU?

2 MR. STENERSON: Object to the form.

3 A. No one said that.

4 BY MR. GLENDE:

5 Q. Was that your understanding?

6 MR. STENERSON: Object to the form.

7 A. I think it was understood going in that there would be  
8 a most favored nation clause. It was the differential  
9 that was a new factor for us to deal with. It was  
10 just kind of accepted that they would get the best  
11 rates.

12 BY MR. GLENDE:

13 Q. Has the MFN caused Covenant's rate to Blue Cross to be  
14 lower than it otherwise would have been?

15 MR. STENERSON: Object to the form.

16 A. Say that again?

17 BY MR. GLENDE:

18 Q. Has the MFN lowered Blue Cross' rate at all?

19 MR. STENERSON: Object to the form.

20 A. No.

21 BY MR. GLENDE:

22 Q. Has the MFN caused any other payers' rates to be  
23 higher than they otherwise would have been?

24 A. No.

25 Q. Does the MFN affect Covenant's ability to contract

MARK GRONDA  
December 13, 2012

Page 83

1 with other payers?

2 MR. STENERSON: Object to the form.

3 A. No.

4 BY MR. GLENDE:

5 Q. Has Covenant asked Blue Cross to remove the MFN from  
6 the LOU?

7 A. Subsequent to your action.

8 Q. That's the lawsuit that was filed in 2010?

9 A. Yes.

10 Q. Why did Covenant ask Blue Cross to remove the MFN?

11 A. Because of your action.

12 Q. Okay. Would the -- did you view that as beneficial to  
13 Covenant --

14 MR. STENERSON: Object to the form.

15 BY MR. GLENDE:

16 Q. -- a removal of the MFN?

17 A. Since it had come in question, we thought it would be  
18 beneficial to remove it.

19 Q. Why is that?

20 A. Because you were contending it was inappropriate,  
21 especially with the differential.

22 Q. What was Blue Cross' response?

23 A. They were just fine with it. They felt removing it  
24 would be -- constitute an admission of guilt. But  
25 more importantly, they felt it was completely legal

MARK GRONDA  
December 13, 2012

Page 84

1 and appropriate.

2 Q. And does Covenant perform any type of analysis to  
3 determine whether it is complying with the MFN in the  
4 LOU?

5 A. There's an annual attestation, and that's where it  
6 happens formally.

7 Q. Okay. What does Covenant do to prepare for the  
8 attestation?

9 A. I don't know the particulars, other than I know Jerry  
10 Rivet does the analysis and says it's okay to sign,  
11 but I don't know the particulars, nor do I want to.

12 Q. And what would be the consequence to Covenant of being  
13 out of compliance with the MFN?

14 MR. STENERSON: Object to the form,  
15 incomplete hypothetical.

16 A. I thought it spelled it out. Well, without reading  
17 it, I think it, to me, I understood it to mean that if  
18 that differential had been breached, that they would  
19 be entitled to a price reduction.

20 BY MR. GLENDE:

21 Q. Okay. Would Covenant have the option to increase  
22 other rates to be in compliance with the MFN?

23 MR. STENERSON: Object to the form.

24 A. That would be an option.

25 BY MR. GLENDE:



MARK GRONDA  
December 13, 2012

Page 120

1 A. No. Doesn't mean it wasn't, but I don't recall it.

2 Q. Do you recall whether Priority was ever mentioned by  
3 name in your negotiations with Blue Cross Blue Shield?

4 A. Absolutely not.

5 Q. Absolutely you don't recall, or it was not mentioned?

6 A. They never mentioned it.

7 Q. Let's switch to a different topic. Since the  
8 effective date of the LOU with Blue Cross and  
9 Covenant, has Covenant negotiated or renegotiated  
10 reimbursement rates with any commercial payers?

11 MR. STENERSON: Object to the form.

12 A. I would have to say yes.

13 BY MS. ALEXANDER:

14 Q. Okay.

15 A. I mean, I could not tell you specifically, but I know  
16 that they all have different expiration dates, and I  
17 know we're negotiating with United, as I mentioned  
18 earlier.

19 You're talking about other payers other  
20 than Blue Cross?

21 Q. Yes, thank you.

22 A. Yeah.

23 Q. Do you know approximately how many other payers  
24 Covenant has negotiated with in that time frame?

25 A. I do not.

MARK GRONDA  
December 13, 2012

Page 121

1 Q. And do you know whether or not the terms of the Blue  
2 Cross-Covenant LOU have impacted any of those  
3 negotiations?

4 A. They have not. I know that.

5 Q. Can you think of a situation where the terms of the  
6 Covenant-Blue Cross LOU might impact negotiations  
7 between Covenant and another commercial payer?

8 MR. STENERSON: Object to the form. You  
9 mean a hypothetical futuristic something that's never  
10 happened example?

11 MS. ALEXANDER: Your objection is noted.

12 MR. FABIEN: I join.

13 BY MS. ALEXANDER:

14 Q. My question is as I said it.

15 A. I would have said no until Obama was re-elected. I'm  
16 not sure what health care reform is going to cause us  
17 to need to do with other payers. We had no desire to  
18 lower rates previously.

19 MR. STENERSON: Nobody knows.

20 THE WITNESS: I know. I don't think it's  
21 going to be good.

22 BY MS. ALEXANDER:

23 Q. Understanding that Covenant doesn't have a desire in  
24 the abstract to lower rates, Covenant does lower rates  
25 on occasion in negotiations with commercial payers,

MARK GRONDA  
December 13, 2012

Page 122

1 correct?

2 MR. STENERSON: Object to the form,  
3 foundation, overbroad.

4 A. There may be a couple exceptions that are not risk  
5 based contracts, but they're few and far between,  
6 where we've gone beyond the 25 percent discount.

7 BY MS. ALEXANDER:

8 Q. Well, Covenant has done that with Blue Cross, right?

9 A. Oh, well, yeah, of course. I thought you meant other  
10 commercials.

11 Q. Sure. And why did Covenant do that with Blue Cross  
12 when it wouldn't do that with other commercial payers?

13 A. Because of the volume they have and they bring to the  
14 table, and I think I addressed it earlier, you  
15 negotiate the best you can, but going de-par is not an  
16 option. It would be too financially devastating to  
17 the hospital.

18 Q. Based on your experience, do you, do you expect that  
19 Covenant would be willing to lower rates in  
20 negotiations with another insurer of comparable size  
21 and volume as Blue Cross?

22 MR. STENERSON: Objection, hypothetical,  
23 speculative.

24 MS. ALEXANDER: Are you done?

25 BY MS. ALEXANDER:

MARK GRONDA  
December 13, 2012

Page 146

1 January 1, 2003?

2 A. That's what it says, yes.

3 Q. So you would be referring to whatever terms may be in  
4 the PHA as it existed in January of 2003?

5 A. Right, right.

6 Q. Separate and apart from your belief, sir, that Blue  
7 Cross had a -- well, strike that.

8 Your belief, your belief was that the MFN  
9 clause you're referring to was what's known as an  
10 equal-to clause?

11 A. I'm not sure what you mean by equal to.

12 Q. Sure. The MFN -- I'm going to disagree with you  
13 whether it existed, but to the extent you believe one  
14 existed, what did you understand its terms to require?

15 A. That we wouldn't give anybody more than a 63 percent  
16 discount.

17 Q. And would that type of commitment matter to you?

18 A. Absolutely not.

19 Q. Why not?

20 A. Because I would never give anybody that rate.

21 Q. And I believe you had also testified earlier that it  
22 was your understanding that Blue Cross, with its large  
23 market share and its volume that they control, would  
24 expect to get the best price. Do you recall saying  
25 that?

MARK GRONDA  
December 13, 2012

Page 147

1 A. I believe I did say that.

2 Q. And I believe you said, in response to that, that you  
3 understood that concept, as well, correct?

4 A. That volume equals bigger discounts, right.

5 Q. Now, also -- strike that.

6 There was some testimony earlier about  
7 current negotiations with UnitedHealthcare, between  
8 Covenant and United, correct?

9 A. Correct.

10 Q. Why has Covenant, prior to -- well, strike that.

11 From anytime 2005 to the forward, has  
12 Covenant had a network contract with United?

13 A. No, we have not, we never had one with United.

14 Q. And why has Covenant never been able to agree with  
15 United on a network contract?

16 A. The primary reason, from our perspective, was  
17 inflexibility on contractual terms, not necessarily  
18 the rates, but there were a lot of other terms and  
19 clauses that we would not just sign a standard  
20 contract, and it was take it or leave it. So that's  
21 been the breakdown.

22 Q. Since 2009 -- strike that.

23 Since July 1, 2009, the effective date of  
24 Gronda 2, has the favored pricing provision in that  
25 agreement impacted your negotiations with United in

MARK GRONDA  
December 13, 2012

Page 148

1 any way?

2 A. Not at all.

3 Q. Since July 1st, 2009, has the favored pricing  
4 provision in Gronda 2 affected Covenant's negotiations  
5 with Aetna in any way?

6 MR. ALLEN: Objection, foundation.

7 A. No.

8 BY MR. STENERSON:

9 Q. Since July 1, 2009, has the favored pricing provision  
10 in Gronda 2 affected Covenant's negotiations with  
11 Priority in any way?

12 MR. GLENDE: Objection, foundation.

13 A. No.

14 BY MR. STENERSON:

15 Q. Since July 1, 2009, has the favored pricing provision  
16 in Gronda 2 affected Covenant's negotiations with  
17 HealthPlus in any way?

18 MR. GLENDE: Objection, foundation.

19 A. No.

20 BY MR. STENERSON:

21 Q. Since July 1, 2009, has the favored pricing provision  
22 in Gronda 2 affected Covenant's negotiations with any  
23 commercial payer in any way?

24 MR. GLENDE: Objection, foundation.

25 A. No.

MARK GRONDA  
December 13, 2012

Page 149

1 BY MR. STENERSON:

2 Q. Since July 1, 2009, has the favored pricing provision  
3 in Gronda 2 prevented Covenant from reaching a network  
4 agreement with any commercial payer?

5 A. No.

6 Q. Since July 1, 2009, has the favored pricing provision  
7 in Gronda 2 caused Covenant to terminate any existing  
8 network contract it had with any commercial payer?

9 A. No.

10 MS. ALEXANDER: Objection, foundation.

11 BY MR. STENERSON:

12 Q. In your view, sir, as the CFO of Covenant, has the  
13 most favored pricing provision in Gronda 2, since July  
14 2009, affected any of Covenant's negotiations with any  
15 commercial payer in any way?

16 MS. ALEXANDER: Objection, foundation.

17 MR. GLENDE: Objection, foundation.

18 A. No.

19 BY MR. STENERSON:

20 Q. And how can you be so certain?

21 A. Because we have no other contracts that are not risk  
22 based that would even come close to the fifteen  
23 percent aggregate, let alone even on an individual  
24 basis.

25 Q. What would you say, sir, to somebody who says that,

MARK GRONDA  
December 13, 2012

Page 150

1 well, Mr. Gronda may think that, but if he didn't  
2 actually have the favored pricing provision, he would  
3 have given all these additional discounts to Aetna and  
4 other commercial payers?

5 MR. ALLEN: Objection to form.

6 A. What would I say to someone that said that?

7 BY MR. STENERSON:

8 Q. Yes.

9 A. I would say they're wrong.

10 Q. And are you the decision maker at Covenant with --  
11 strike that.

12 Who at Covenant makes the decision as to  
13 what rates to offer commercial payers?

14 A. Ultimately, it resides with me.

15 Q. And has that been true from July 2009 to the present?

16 A. Yes.

17 Q. So, I believe also in response to some questions from  
18 counsel earlier, you were asked why you believed Blue  
19 Cross wanted the favored pricing provision. Do you  
20 remember that series of questions?

21 MS. ALEXANDER: Objection.

22 A. I don't.

23 BY MR. STENERSON:

24 Q. Let me ask you if you recall saying that you believe  
25 that Blue Cross wanted the favored pricing provision



MARK GRONDA  
December 13, 2012

Page 151

1 in Gronda 2 because it, quote, maintains their pricing  
2 advantage. Do you recall saying that?

3 A. Yeah. I would agree with that.

4 Q. Based on the testimony you just gave about the lack of  
5 any impact of the favored pricing provision, am I  
6 correct in understanding that you believe, at Covenant  
7 Hospital, Blue Cross would have had -- maintained  
8 their pricing advantage without the favored pricing  
9 provision?

10 MS. ALEXANDER: Objection, form.

11 MR. ALLEN: Objection, form, foundation.

12 A. Yes.

13 BY MR. STENERSON:

14 Q. I'm going to hand you what I'm going to have marked as  
15 Blue Cross 1301 --

16 MARKED FOR IDENTIFICATION:

17 BLUE CROSS EXHIBIT 1301

18 4:02 p.m.

19 BY MR. STENERSON:

20 Q. -- ask you to take a moment and review that, sir.

21 A. Okay, I reviewed it at a high level.

22 Q. Okay. Blue Cross 1301 is a letter from you to  
23 Mr. Darland, dated November 17th, 2008, is that  
24 correct?

25 A. Correct.

MARK GRONDA  
December 13, 2012

Page 192

1 A. Correct.

2 BY MR. STENERSON:

3 Q. Okay, we're done with that document.

4 Mr. Glende asked you this before, but I  
5 just want to make sure your memory hasn't changed. Do  
6 you remember having any discussions about whether or  
7 not BIP payments would continue or not at Covenant?

8 A. I really don't remember those. I've read the  
9 documents, but, no, I had no recollection of it.

10 Q. And, as of today, what is your best understanding of  
11 whether or not BIP payments are received by Covenant  
12 from Blue Cross?

13 A. Based on what I've read, they're not.

14 Q. But, as you sit here, you have no specific memory of  
15 the circumstances regarding that?

16 A. No, not until I read it. I had some vague  
17 recollection after reading the document, but that  
18 doesn't seem like it was a hot button we negotiated.

19 Q. Okay. Do you recall the first time McLaren Health  
20 Care approached Covenant seeking a network agreement?

21 A. I don't. I know it would have been obviously sometime  
22 after they acquired what was Bay Medical, but I don't  
23 recall a specific date.

24 Q. And am I correct in understanding that currently  
25 McLaren Health Care does not have a network agreement

MARK GRONDA  
December 13, 2012

Page 193

1 with Covenant?

2 A. That's correct.

3 Q. Does McLaren not having a network agreement with  
4 Covenant have anything whatsoever to do with the  
5 favored pricing provision that is in Gronda 2?

6 A. No.

7 Q. Have you been involved personally in discussions with  
8 anyone at McLaren about a potential network contract  
9 at Covenant, as well as a potential network contract  
10 for Priority at McLaren's facilities?

11 A. Not personally.

12 Q. Who has had those conversations?

13 A. Gayle Biederman.

14 Q. Okay. Do you know who at McLaren she's spoken to?

15 A. No, I don't. She told me and I can't recall.

16 Q. Has there been any -- and to the extent you know, has  
17 there been any Priority executives involved in those  
18 discussions?

19 A. There have not been.

20 Q. So your understanding is that at least to this point,  
21 there's been discussions between Covenant and McLaren?

22 A. Correct.

23 Q. And has it been representatives, if you know, of  
24 McLaren Health Care or the McLaren hospitals?

25 A. McLaren Health Plan.

MARK GRONDA  
December 13, 2012

Page 194

1 Q. Health plan.

2 A. What was your -- I want to make sure --

3 Q. Sure. You understand McLaren both owns hospitals and  
4 the health plan?

5 A. It's the health plan I'm talking about, yeah.

6 Q. Do you know if the health plan has any involvement in  
7 network contracting on behalf of the McLaren  
8 hospitals?

9 A. I assume they did, but I don't know that for a fact.

10 Q. Okay. Suffice it to say you have not had the personal  
11 conversations?

12 A. I have not.

13 Q. And when did those conversations occur, to the best of  
14 your understanding?

15 A. Most recently, or --

16 Q. Most recently.

17 A. Within the last 60 days.

18 Q. Do you know if the potential for new network contracts  
19 with McLaren at Covenant and with Priority at the  
20 McLaren hospitals is still an open issue?

21 A. It is, to the extent I asked her to go back one more  
22 time, because it was kind of a -- there was no  
23 follow-up phone call from them, so we just wanted to  
24 verify that that meant they didn't have an interest,  
25 or they just -- someone was not very compulsive about

**EXHIBIT 15**  
**Filed Under Seal**

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

```

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

```

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

```

-----:
AETNA INC.,                 :
                               :
                               : Civil Action No.:
                               :
                               : 2:11-cv-15346-DPH-MKM
BLUE CROSS BLUE SHIELD OF   :
MICHIGAN,                   :
                               :
                               :
Defendant.                   :
-----:

```

Marquette, Michigan

Thursday, December 6, 2012

Confidential Video Deposition of:

Jerry L. Worden,

was called for oral examination by counsel for Plaintiff, pursuant to Notice, at Marquette General Hospital, Wallace Building, 420 Magnetic Street, Marquette, Michigan, before Michele E. French, RMR, CRR, of Capital Reporting Company, a Notary Public in and for the State of Michigan, beginning at 9:36 a.m., when were present on behalf of the respective parties:

1 e-mail, he asks, "If there is any information that you  
2 can share with us that informs our analysis regarding 14:06:09  
3 our competitive position relative to the market, it  
4 could assist us in our decision making."

5 Do you see that?

6 A Yes.

7 Q Do you recall after May 6, 2010, providing any 14:06:18  
8 information to Priority?

9 A I did not provide any additional information.

10 Q And the last sentence says, "Regarding the  
11 professional fee schedule proposal: Is there any  
12 feedback on that?" 14:06:30

13 Do you see that?

14 A Yes.

15 Q Do you recall any time after May 6, 2010,  
16 responding to Mr. Crofoot's request about a fee  
17 schedule? 14:06:41

18 A We never spent any time analyzing the  
19 physician fee schedule, as we were focused on the  
20 hospital first and then we would look at that. Someone  
21 looked at it for me, but I have no recollection of any  
22 results of that. 14:06:55

23 Q And do I understand correctly that the  
24 hospital rate in the first e-mail in Worden 10 of -- in  
25 the May 5th, 2010 e-mail -- well, strike that.





1 working with Priority because I felt they weren't  
2 interested in working with us on the outpatient -- or 14:08:05  
3 the out-migration issue, and I felt as if they were just  
4 going to check a box and said they also can offer  
5 services in the U.P. I wanted a partner that would work  
6 with us and help us keep business in Michigan.

7 BY MR. STENERSON: 14:08:22

8 Q Separate and apart from Priority, do you  
9 believe the favored pricing provision in Worden Number 3  
10 prevented Marquette from entering into competitive  
11 agreements with any other commercial insurers in the  
12 U.P.? 14:08:35

13 A Not that I'm aware of.

14 Q And, again, you are the person with authority  
15 to decide those issues?

16 A That is correct.

17 Q And if there was such a payer, you would have 14:08:40  
18 expected to become aware?

19 A Yes.

20 MR. GRINGER: Object to form.

21 MR. STENERSON: Take a short break.

22 VIDEOGRAPHER: Okay. We're going off the 14:08:52  
23 record at 2:08 p.m.

24 (Recess - 2:08 p.m. to 2:15 p.m.)

25 VIDEOGRAPHER: The time is 2:15 p.m., and

1 we are back on the record.

2 BY MR. STENERSON: 14:16:35

3 Q Mr. Worden, I believe you said you had had a  
4 phone call with lawyers from the Department of Justice  
5 prior to today?

6 MR. GRINGER: Object to form, misstates  
7 his prior testimony. 14:16:45

8 BY MR. STENERSON:

9 Q Strike that.

10 A An interview. It was not a phone call.

11 Q And do you know if you -- well, strike that.

12 Did you have more than one interview? 14:16:52

13 (Interruption.)

14 MR. WARHEIT: My apologies about that.

15 MR. STENERSON: That's okay. I'll re-ask  
16 the question.

17 BY MR. STENERSON: 14:17:13

18 Q How many interviews have you had with the  
19 Department of Justice lawyers?

20 MR. ETTINGER: I know, but I'm not the  
21 witness.

22 MR. STENERSON: I don't, so I have to 14:17:19  
23 ask.

24 THE WITNESS: I don't -- I don't recall a  
25 phone call, but I may have had one. In fact, I believe

1 I did have a phone call, at least one phone call and  
2 then an interview in my office. 14:17:30

3 BY MR. STENERSON:

4 Q But do you -- you recall a face-to-face  
5 meeting?

6 A Yes.

7 Q And during that meeting, did the Department of  
8 Justice lawyers ask you about your views of the favored  
9 pricing provision in the Blue Cross agreement? 14:17:38

10 MR. GRINGER: Object to form.

11 THE WITNESS: Essentially the same  
12 discussion we've had today in this deposition. 14:17:47

13 BY MR. STENERSON:

14 Q And did you essentially express to them the  
15 same things you've expressed today?

16 MR. GRINGER: Object to form.

17 THE WITNESS: Yes. 14:17:56

18 BY MR. STENERSON:

19 Q And did you tell the Department of Justice  
20 lawyers during that interview that you believed that the  
21 favored pricing provision did not prevent Marquette from  
22 providing competitive contracts to other payers? 14:18:02

23 MR. GRINGER: Object to form.

24 THE WITNESS: I'm not sure I used those  
25 exact words, but we talked about that we didn't think it

1 affected any of our business dealings.

2 BY MR. STENERSON: 14:18:12

3 Q And you expressed that to the Department of  
4 Justice at the time of the interview?

5 MR. GRINGER: Object to form.

6 THE WITNESS: I believe so.

7 BY MR. STENERSON: 14:18:16

8 Q Do you recall when the interview occurred?

9 A I don't recall. It was summer of 2011.

10 Q Let me show you what -- do you recall the --  
11 strike that.

12 Do you recall which Department of Justice 14:18:34  
13 lawyers attended the interview?

14 A The two gentlemen here today.

15 Q That's Mr. Gringer and Mr. Kramer?

16 A Yes.

17 Q Anyone else? 14:18:43

18 A My representative, David Ettinger, also.

19 Q I show you what I am going to mark as Blue  
20 Cross 1801.

21 (Blue Cross Exhibit 1801 was marked.)

22 THE WITNESS: (Reviewing Blue Cross 14:19:18  
23 Exhibit 1801.)

24 BY MR. STENERSON:

25 Q Mr. Gringer asked you if you recalled any

1 discussions about rates with PHP. Do you recall that?

2 A Yes. 14:19:29

3 Q I'd like you to take a moment and review 1801  
4 and ask if that refreshes any of your memory.

5 A (Reviewing Blue Cross Exhibit 1801.) Okay.  
6 Yeah, I'm aware of this.

7 Q Okay. So this is, Mr. Worden, an e-mail from 14:19:52  
8 you to Mr. Smith dated May 4th, 2012; is that correct?

9 A Yes.

10 Q And you write to Mr. Smith, "Until the DLP  
11 transaction is completed I am unable to negotiate  
12 commercial discounts with payors." 14:20:05

13 Do you see that?

14 A Yes.

15 Q And you mentioned a moment ago you recall  
16 this. What was the purpose of you writing this to  
17 Mr. Smith? 14:20:15

18 A I believe if you go back to the previous  
19 e-mail, that Steve and Dennis were approached by, it  
20 looks like, PHP to discuss contracting options with  
21 Marquette.

22 At that time of May 2012, we were deep in 14:20:29  
23 terms of the due diligence and finalization of the sale  
24 of Marquette General to Duke LifePoint, and at that time  
25 we had little interest, if any, to negotiate any new

**EXHIBIT 19**  
**Filed Under Seal**

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

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

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

-----: :  
 AETNA INC., : :  
 : :  
 Plaintiff, : : Civil Action No.  
 v. : :  
 BLUE CROSS BLUE SHIELD OF : : 2:11-cv-15346-DPH-MKM  
 MICHIGAN, : :  
 : :  
 Defendant. : :  
 -----: :

Lansing, Michigan  
Wednesday, August 8, 2012

Confidential Video Deposition of:

PAULA M. REICHLER,

was called for oral examination by counsel for  
Plaintiff, pursuant to Notice, at Foster Swift Collins &  
Smith, at 313 South Washington Square, Lansing,  
Michigan, before Michele E. French, RMR, CRR, of Capital  
Reporting Company, a Notary Public in and for the State  
of Michigan, beginning at 9:14 a.m., when were present  
on behalf of the respective parties:

1 consumed.

2 Q And who decides the price of hospital services **14:01:07**  
3 at Sparrow?

4 A The actual charge?

5 Q Yes.

6 A I would decide that.

7 Q The hospital; correct? **14:01:22**

8 A The hospital and then I just, you know,  
9 execute the changes, yeah.

10 Q But there's no entity, no party other than the  
11 hospital who makes the decision as to what the hospital  
12 services price is; is that correct? **14:01:31**

13 A There is no other entity, no.

14 Q And it's your unilateral decision alone to set  
15 the charge where you set it?

16 MR. DANKS: Object to form.

17 THE WITNESS: It is. **14:01:41**

18 BY MR. STENERSON:

19 Q So who, if anyone, tells you where to set your  
20 prices at Sparrow?

21 A No one does.

22 Q Okay. And who at Sparrow decides which **14:01:49**  
23 commercial payors to contract with -- or strike that.

24 Who, other than Sparrow itself, decides  
25 which commercial payors Sparrow should contract with?



1 A No one.

2 Q And does Blue Cross's most favored nation **14:02:04**  
3 provision in any way determine who or if Sparrow should  
4 have a commercial payor contract with?

5 MR. DANKS: Object to form.

6 THE WITNESS: No.

7 BY MR. STENERSON: **14:02:18**

8 Q And does Blue Cross's most favored nations  
9 provision in any way determine how or how much Sparrow  
10 should set its price for hospital services?

11 MR. DANKS: Object to form.

12 THE WITNESS: No. **14:02:28**

13 BY MR. STENERSON:

14 Q Now I'd like you to move, if you could, to  
15 Exhibit 6.

16 Now, you explained earlier that this is  
17 converted to percentage of charges so you can compare **14:03:11**  
18 across payors; is that correct?

19 A Correct.

20 Q And do I understand that -- well, strike that.

21 What is your understanding of the reason  
22 why Blue Cross's percent of charge payment is declining **14:03:22**  
23 from 2010 to the current rate in 2012?

24 A Because we have increased our prices 4 percent  
25 each year, and the payment has not -- the inflationary

1 increase on our payments has not increased at the same  
2 pace, but there -- yeah. **14:03:44**

3 Q Okay. And so why, if we look at, for example,  
4 the "Commercial" line in 2010, 2011, and '12, do you  
5 have an opinion as to why that is relatively flat as  
6 compared to the Blue Cross declining rate?

7 A Because it's a percent of charge and so it -- **14:04:03**  
8 the percent of charge is fixed. So if a commercial  
9 insurer's contract says they'll pay us 64 percent of  
10 charge, the charge goes up, they pay 64 percent of  
11 charge.

12 Q And so am I correct that the Blue Cross most **14:04:19**  
13 favored nations provision has nothing to do with the  
14 fact that the range between Blue Cross's percentage and  
15 others is widening; is that correct?

16 A The MFN clause has no impact on this, on why  
17 the numbers are moving like this. **14:04:44**

18 Q In fact, it's true, is it not, that the most  
19 favored nations provision, MFN, has not impacted a  
20 single payor's price since it's been executed; is that  
21 right?

22 MR. DANKS: Object to form. **14:04:57**

23 THE WITNESS: Are you asking me if I -- I  
24 guess I need you to ask the question differently.

25 BY MR. STENERSON:

1 Q Have you changed anybody's reimbursement rate  
2 because of the most favored nations provision? **14:05:12**

3 A No.

4 Q Have you changed Aetna's reimbursement rate  
5 because of the most favored nations provision?

6 A No.

7 Q Have you changed CIGNA's reimbursement rate **14:05:21**  
8 because of the most favored nations provision?

9 A No.

10 Q Have you changed McLaren's reimbursement rate  
11 because of the most favored nations provision?

12 A No. **14:05:31**

13 Q Have you changed PHP's rate because of the  
14 most favored nations provision?

15 A No.

16 Q Have you changed PPOM's rate because of the  
17 most favored nation provision? **14:05:39**

18 A No.

19 Q Have you changed any payor's rate because of  
20 the most favored nations provision?

21 A No.

22 Q And that would be true for the entire period **14:05:49**  
23 in 2010?

24 A Correct.

25 Q And it's true for the entire period in 2011?

1 A Correct.

2 Q And it's true for the entire period in 2012? **14:05:57**

3 A Correct.

4 Q And that's true for the entire period since  
5 you have been CFO of Sparrow?

6 A Correct.

7 Q Have you refused to lower anybody's **14:06:05**  
8 reimbursement rate because of the Blue Cross MFN?

9 A No.

10 Q Have you refused to lower Aetna's rate because  
11 of the Blue Cross MFN?

12 A No. **14:06:21**

13 Q Have you refused to lower McLaren's rate  
14 because of the Blue Cross MFN?

15 A No.

16 Q Have you refused to lower PHP's rate because  
17 of the Blue Cross MFN? **14:06:29**

18 A No.

19 Q Have you refused to lower PPOM's rate because  
20 of the Blue Cross MFN?

21 A No.

22 Q Have you refused to lower any commercial **14:06:36**  
23 payor's rate because of the Blue Cross MFN?

24 A No.

25 Q Has any single patient since you've been CFO

1 of Sparrow Hospital paid a penny more in hospital  
2 services at Sparrow because of the Blue Cross MFN?

**14:06:48**

3 A No.

4 MR. DANKS: Object to form.

5 MR. STENERSON: I'd like to take a short  
6 break.

7 VIDEOGRAPHER: The time is now 2:06 p.m. **14:07:02**

8 We are off the record.

9 (Recess - 2:06 p.m. to 2:16 p.m.)

10 VIDEOGRAPHER: We are back on the record.

11 The time is 2:16 p.m.

12 BY MR. STENERSON: **14:17:04**

13 Q Right before the break, I asked you a series  
14 of questions about whether or not you had refused to  
15 lower any commercial payor's rate at Sparrow because of  
16 the Blue Cross MFN. Do you recall that?

17 A Yes, I do. **14:17:18**

18 Q And were those answers true for your entire  
19 period as CFO at Sparrow?

20 A Yes.

21 Q And if that were to occur, are you the person  
22 who would know? **14:17:26**

23 MR. DANKS: Object to form.

24 THE WITNESS: I believe so. I guess that  
25 somebody could have talked to someone else without my

1 knowledge, but as far as my conversations, that's true.

2 BY MR. STENERSON: **14:17:35**

3 Q And you have final decision-making authority  
4 on rates at Sparrow for commercial payors; correct?

5 A Correct.

6 Q So at any time since you've been CFO, has  
7 Sparrow refused to enter into a commercial payor **14:17:48**  
8 contract with any commercial payor because of the Blue  
9 Cross MFN?

10 A No.

11 Q Since you've been CFO, has Sparrow refused to  
12 contract with Priority because of the Blue Cross MFN? **14:17:59**

13 A No.

14 Q Since you've been CFO at Sparrow, has the  
15 Hospital refused to contract with United because of the  
16 Blue Cross MFN?

17 A No. **14:18:11**

18 Q Since you've been CFO at Sparrow, have you  
19 terminated any commercial payor contract because of the  
20 Blue Cross MFN?

21 A No.

22 Q And, again, that's for the entire period as **14:18:22**  
23 CFO?

24 A Correct.

25 Q What was the date you started?

1 A July 9th, 2009.

2 Q If you could pull out Exhibit 8, please. **14:18:34**

3 A Um-hum.

4 Q Do you see the last line of Exhibit 8?

5 A Yes.

6 Q Exhibit 8, before that last line, says --

7 well, strike that. **14:19:34**

8 What is Exhibit 8?

9 A It's an e-mail from a gentleman -- I assume a  
10 gentleman named Lee Garner -- to me regarding  
11 contracting with United Healthcare.

12 Q And in the second-to-the-last line he says, "**14:19:51**  
13 have spoken with them" -- meaning United -- "and they  
14 are interested in contracting with you for their  
15 national products." Do you see that?

16 A Yes.

17 Q And then he states, "These products would not **14:20:02**  
18 be in competition with PHP, your HMO." Correct?

19 A Correct.

20 Q Does PHP sell national products?

21 A Not really.

22 Q Can you explain, again, to those of us who **14:20:14**  
23 aren't in the hospital industry, what are national  
24 products, as you understand them?

25 A When you have a national contract with, like,

1 quality measures, so both of those organizations have  
2 contributed to hospitals paying attention to those **14:55:01**  
3 things, not just for the good of the patient but because  
4 there is financial incentives related to them.

5 Q And it's not just for the good of the Blue  
6 Cross patient, either?

7 A No, no. **14:55:19**

8 Q All patients benefit from Sparrow's quality  
9 initiatives --

10 A Yes.

11 Q -- funded by Blue Cross?

12 A Some of it funded by Blue Cross, yes. **14:55:26**

13 Q Do you know what BIP payments are?

14 A Yes.

15 Q What are BIP payments?

16 A BIP are Blue Cross Interim Payments.

17 Q And how, if at all, do Blue Cross BIP payments **14:55:40**  
18 assist in Sparrow's financial condition?

19 A Basically a BIP is an estimated payment. So  
20 you project how much Blue Cross business and patients  
21 you're going to see in a certain period of time, and  
22 then Blue Cross, in essence, sends us a fixed amount of **14:55:58**  
23 money every week, cash, so the cash isn't necessarily  
24 tied directly to the claims we're processing. And then  
25 there's a settlement process once a year where we settle



1 up and balance out the interim payments we received  
2 against what we actually should have received for **14:56:17**  
3 services provided.

4 Q And do you find those payments to be  
5 financially beneficial to the hospital?

6 A They're predictable, again.

7 Q And there's benefit in that predictability? **14:56:29**

8 A Yes. In the end, it all amounts to the same  
9 amount of money, but, you know, it just comes every  
10 week.

11 Q Do you recall Aetna ever approaching you for a  
12 rate equal to Blue Cross plus 2? **14:57:09**

13 A I -- I don't recall. It doesn't mean they  
14 didn't, but I don't recall it.

15 Q If you have no memory, then that's fine.

16 A I don't.

17 Q I think earlier counsel for Aetna was talking **14:57:26**  
18 about the hypothetical situation of if Blue Cross's rate  
19 is 40, and they asked for the Wal-Mart rate of 45, that  
20 would be within 5 of Blue Cross. And you made a comment  
21 in passing and said something like "I wouldn't set  
22 Aetna's rate like that." Do you recall that comment? **14:57:46**

23 A Yes.

24 Q What did you mean by that?

25 A I don't set rates based on the MFN clause. I

1 just -- that's not the first thing that I think about.

2 Q You don't; correct? **14:58:00**

3 A Correct.

4 Q And you haven't?

5 A I haven't.

6 Q To any payor?

7 A No. **14:58:05**

8 Q So I'm correct?

9 A Yes. I have not set -- I don't use the MFN  
10 clause to set rates.

11 Q And you've never done so, ever?

12 A No. **14:58:18**

13 Q So my statement is correct?

14 A Yes.

15 MR. DANKS: Object to the form.

16 MR. STENERSON: I'm just trying to make  
17 the -- I think we agree with each other now, but when we **14:58:21**  
18 read the transcript later, I want to make sure it's  
19 clear.

20 I'll take a short break and then I think  
21 I'll finish up on the next round.

22 THE WITNESS: Okay. **14:58:35**

23 VIDEOGRAPHER: The time is now 2:57 p.m.

24 We are off the record.

25 (Recess - 2:57 p.m. to 3:10 p.m.)

1 VIDEOPHOTOGRAPHER: We are back on the record.

2 The time is 3:10 p.m. 15:11:18

3 (Blue Cross Exhibit 259 was marked.)

4 BY MR. STENERSON:

5 Q I show you, ma'am, what has been marked as  
6 Blue Cross Exhibit 259, and ask you to take a look at  
7 it. 15:11:29

8 A Yes.

9 Q Do you recognize Blue Cross 259?

10 A I do.

11 Q What is it?

12 A It is an MOU between Priority and Sparrow 15:11:36  
13 Health System regarding a commercial contract.

14 Q Okay. And what is the date of Blue Cross 259?

15 A Expected effective date is April 1st. It was  
16 signed in January of 2010, by Dennis Swan.

17 Q At the time you joined Sparrow Hospital -- I'm 15:12:03  
18 sorry. And who are the parties to Exhibit Blue Cross  
19 259?

20 A Priority -- Priority Health and Sparrow Health  
21 System.

22 Q At the time you joined Priority -- strike 15:12:12  
23 that.

24 At the time you joined Sparrow as its CFO  
25 in the summer of 2009, did Sparrow have a payor contract