

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 BRIEF IN OPPOSITION TO NON-  
PARTIES JOSEPH T. AOUN AND NUYEN, TOMTISHEN  
AND AOUN, P.C.’S MOTION TO QUASH SUBPOENA [DKT. #110]**

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 Brief in Opposition to Non-Parties Joseph T.

Aoun and Nuyen, Tomtishen and Aoun, P.C.'s Motion to Quash Subpoena [Dkt. #110] and corresponding exhibits.

This 14th day of October 2016.

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**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.

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**EXHIBIT 1**

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

THE SHANE GROUP, INC., et al.,  
on behalf of themselves and all others  
similarly situated

Plaintiffs,

v.

Civil Action No. 11-cv-14360-DPH-MKM  
Hon. Denise Page Hood  
Hon. Mona K. Majzoub

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

Defendant.

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**BLUE CROSS BLUE SHIELD OF MICHIGAN'S BRIEF IN OPPOSITION  
TO NON-PARTIES JOSEPH T. AOUN AND NUYEN, TOMTISHEN  
AND AOUN, P.C.'S MOTION TO QUASH SUBPOENA**

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## I. INTRODUCTION

Blue Cross Blue Shield of Michigan’s (“Blue Cross”) subpoenas to Joseph Aoun (“Mr. Aoun”) and his law firm, Nuyen, Tomtishen and Aoun, P.C. (the “Firm”), seek factual information regarding the negotiation of numerous contracts between several Michigan hospitals and commercial health insurers – information that this Court previous found to be “highly relevant to the central issue in this case.”<sup>1</sup> *United States v. Blue Cross Blue Shield of Michigan*, No. 10-cv-14155; 2012 U.S. Dist. LEXIS 141355, \*14-15 (E.D. Mich., Oct. 1, 2012) (D.E. 216; the “October 1 Opinion and Order”). Further, Blue Cross seeks factual information regarding other economic factors affecting the state of competition among commercial insurers in the State of Michigan. This information is specifically relevant to rebutting allegations made by the Department of Justice (“DOJ”) and State of Michigan in their Complaint and otherwise supporting Blue Cross’s defenses.

The record – which includes Mr. Aoun’s own statements –demonstrates that Mr. Aoun:

- was personally involved in the negotiations between at least sixteen different Michigan hospitals and commercial health insurers at all times relevant to this litigation, and negotiated numerous such contracts during the time period;
- was personally involved in the negotiation of one of – if not, the – first “most favored nation” provisions (“MFN”) included in any Blue Cross contract with a Michigan Hospital;
- has personal knowledge regarding the effect (or lack thereof) of the inclusion of MFNs in Blue Cross contracts with certain hospitals on those hospitals’ contracts with other commercial payers, and provided that information to the Department of Justice;

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<sup>1</sup> The subpoenas to Mr. Aoun and his Firm were served only in the Department of Justice case. This is consistent with the parties’ practice in all three coordinated cases, whereby subpoenas are often served in one case, but the discovery is applicable in all cases. Indeed, the recent stipulated orders entered by the Court on December 5, 2012 and December 6, 2012 in all three cases for depositions to be taken after the November 30, 2012 close of discovery included Mr. Aoun’s deposition in all three cases. Moreover, the Orders expressly conditioned that deposition on the resolution of this motion. Thus, the motion and this response is applicable to all three cases, and Blue Cross will therefore file its response under all three docket numbers.

- has personal knowledge regarding the existence of other economic factors affecting Michigan hospitals, such as Medicare and Medicaid shortfalls, bad debt and uncompensated care, that directly rebut allegations in Plaintiffs' Complaint;
- participated as a "consultant" in at least one meeting with the Governor's senior staff regarding the "Competitive Environment" for the Michigan insurance market;

Thus, Blue Cross seeks information acquired by Mr. Aoun through his involvement in or observation of transactions or occurrences that are part of the subject matter of this lawsuit. Accordingly, such information is not "expert opinion" and is discoverable.

Further, Mr. Aoun's unsubstantiated claims of privilege and undue burden are contradicted and nullified by evidence in the record and his own Motion to Quash Subpoena (the "Motion") that Mr. Aoun voluntarily disclosed the requested information during the course of the relevant negotiations and/or to attorneys for the DOJ, officials of the State of Michigan, and at various other public presentations and/or meetings. Plainly, Mr. Aoun cannot maintain that any information disclosed to or exchanged with entities he was not representing (including the DOJ, State of Michigan, or Blue Cross itself) or at public forums is protected by the attorney-client privilege. Moreover, the fact that Mr. Aoun recently and repeatedly disclosed information regarding the same topics on which Blue Cross now seeks discovery demonstrates that the burden (if any) of testifying at the requested deposition and otherwise responding to the subpoenas now would not be undue, and surely would not outweigh the considerable relevance of the information requested.

Accordingly, the instant Motion must be denied and the discovery sought by Blue Cross via the subpoenas at issue should be compelled.

## **II. STATEMENT OF FACTS**

Plaintiffs filed this lawsuit alleging, generally, that Blue Cross has reduced competition in the sale of health insurance throughout Michigan by including MFNs in its contracts with various



One such contract negotiated by Mr. Aoun was one of the very early, if not the first, Blue Cross contract with a Michigan hospital to contain an MFN provision. *See*, June 2, 2004 Correspondence; **Exhibit B**. Thus, Mr. Aoun should have relevant information about the benefits of these provisions and the reasons why these provisions are included in contracts. These issues are at the core of this case.

[REDACTED]

[REDACTED] The factual basis for these statements and any other conversations Mr. Aoun may have had where similar information was conveyed are clearly relevant to this lawsuit.

[REDACTED]

[REDACTED]

[REDACTED] In other words, contrary to the allegations that Blue Cross *overpays* hospitals, Mr. Aoun told the DOJ that Blue Cross *underpays* hospitals. Moreover, he clearly told DOJ that Blue Cross's hospital cost advantage was caused by something other than MFNs. Again, these issues are not only relevant, they are central to this case.

Finally, Mr. Aoun's dissemination of knowledge relevant to this lawsuit is not limited to these proceedings. As stated in his Motion, Mr. Aoun has publically disclosed his personal experience regarding Blue Cross's business practices, including the inclusion of MFNs in contracts with Michigan Hospitals, in various public forums and hearings. Mr. Aoun produced certain Power Point slides used in a presentation he gave in September, 2012, including a slide titled "Provider Rates – Strategies to Level the Playing Field," stating "Most Favored Nation Clauses – Should be prohibited; Status of current litigation against BCBSM." *See, Exhibit D, Aoun000414.*

Other documents produced demonstrate that Mr. Aoun attended at least one meeting between the Michigan Association of Health Plans' CEO and Executive Board and the

Governor's senior staff on the "Competitive Environment" of insurance within the State of Michigan. *See, Exhibit E.* The document states Mr. Aoun attended as a "consultant," not as counsel for any of the other attendees or interested parties. *Id.* That document further demonstrates that a discussion took place regarding "the inequity of payments relative to charges of BCBSM compared to other payers . . . ." *Id.*

Prior to the filing of the instant Motion, Blue Cross advised Mr. Aoun that it was aware of the information he had disclosed to the DOJ, in addition to the public presentations and hearings he gave or otherwise participated in, and sought his deposition given the relevance of his personal knowledge to the claims and defenses asserted in this lawsuit. Mr. Aoun nonetheless sought to avoid compliance with the Subpoenas by filing his Motion to Quash making the bald, unsubstantiated and incorrect claim that Blue Cross is seeking his "expert" opinion. Moreover, notwithstanding the fact that Mr. Aoun previously, on multiple occasions, publically disclosed the information sought to the DOJ and/or in public presentations and hearings, he claims that testifying and otherwise producing the same information pursuant to Blue Cross's subpoenas would risk disclosure of privileged information and be unduly burdensome. Mr. Aoun's Motion fails to establish any meritorious reason why the relevant discovery requested should not be had, and therefore must be denied.

### III. ARGUMENT

Blue Cross's third-party subpoenas to Aoun and his Firm were issued under Rule 45 and are therefore subject to the same general relevancy standard applicable to discovery set forth in Rule 26 (b)(1). *See, October 1 Opinion and Order, 2012 U.S. Dist. LEXIS 141355, \*14-15 (citing Martin v. Oakland County, No. 06-12602, 2008 U.S. Dist. LEXIS 84217, at \*1 (E.D. Mich., Oct. 21, 2008)).* "Parties may obtain discovery on any matter that is not privileged and is relevant to any party's claim or defense if it is reasonably calculated to lead to the discovery of

admissible evidence.” October 1 Opinion and Order, 2012 U.S. Dist. LEXIS 141355, \*6-7; Fed.R.Civ.P. 26 (b)(1). “Relevancy under this rule is construed broadly to encompass ‘any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case.’” *Borom v. Town of Merrillville*, No. 2:07 CV 98, 2009 WL 1617085, at \*1 (N.D. Ind. June 8, 2009) (quoting *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002)).

A non-party seeking to quash a subpoena bears a heavy burden of proof of demonstrating that the discovery sought should not be allowed. *Operating Eng’rs Local 324 Health Care Plan v. Mid Michigan*, No. 10-CV-12987, 2011 U.S. Dist. LEXIS 41575, at \*7 (E.D. Mich. Apr. 18, 2011) (Mazjoub, M.J.); *see also*, October 1 Opinion and Order, 2012 U.S. Dist. LEXIS 141355, \*18; *Lowe v. Vadlamudi*, No. 08-10269, 2012 U.S. Dist. LEXIS 127586, \*2 (E.D. Mich., Sept. 7, 2012); 9A Wright & Miller, Federal Practice & Procedure § 2643, p. 507). A non-party seeking to avoid a subpoena “cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena.” October 1 Opinion and Order, 2012 U.S. Dist. LEXIS 141355, \*18. Even if the non-party makes such a showing, the Court still must weigh “the likely relevance of the requested material . . . against the burden . . . of producing the material.” *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994).

**A. The subpoenas seek information that is “highly relevant to the central issue in this case.”**

As demonstrated above, Mr. Aoun possesses information bearing directly on the claims, allegations, and defenses in this action, and that is therefore relevant and discoverable under Fed.R.Civ.P. 26(b)(1) and 45.





relevant to Plaintiffs' allegations to the contrary. [REDACTED] Thus, Blue Cross is entitled to discovery of Mr. Aoun's testimony and his and his Firm's unprivileged documents regarding those contracts and negotiations, and any other contracts and negotiations observed by Mr. Aoun, or in which he was involved, between Michigan hospitals and commercial health insurers.

The record also establishes, and Blue Cross seeks to discover, Mr. Aoun's knowledge regarding other economic factors that are affecting hospital's rates with commercial insurers. For instance, Plaintiffs allege in this lawsuit that Blue Cross uses MFNs to, essentially, overpay hospitals in an attempt to drive up prices to a point that other commercial insurers cannot afford to compete. *See, e.g.*, Complaint at pp. 20 – 30 (¶¶ 41, 44, 50, 58, 65, 75). However, contrary to this contention, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Any information or documents in Mr. Aoun's or his Firm's possession relating to this observation, or any other factors affecting competition among commercial health insurers, are relevant to Blue Cross's efforts to disprove further Plaintiffs' allegations and are therefore discoverable.

Blue Cross is also entitled to discovery regarding the presentations Mr. Aoun gave or meetings Mr. Aoun attended regarding either this lawsuit itself, or the operative facts at issue in this lawsuit. For instance, the factual basis and any materials relied upon for Mr. Aoun's assertion in his July 2012 presentation that MFN provisions "[s]hould be prohibited," and his

status report of the current litigation, are relevant to the same assertions made in this lawsuit. Similarly, the facts disclosed during the January 31, 2012 meeting Mr. Aoun attended with the Governor's senior staff on "Competitive Environment" may bear on the same issue at the center of this lawsuit.

Accordingly, Blue Cross has easily demonstrated the relevance of the information sought to this lawsuit.

**B. Blue Cross seeks to depose Mr. Aoun as a percipient witness with relevant knowledge and information, not as an "expert".**

Mr. Aoun erroneously contends that the subpoena for his deposition should be quashed because it seeks his self-proclaimed "expert opinions." Notably, Mr. Aoun makes no attempt to establish that the information sought would be expert opinions or otherwise substantiate his conclusory assertion. To the contrary, as stated above, Blue Cross intends to depose Mr. Aoun as a percipient witness, seeking information obtained by Mr. Aoun through his involvement in and observations of contract negotiations and business transactions of various Michigan hospitals implicated in this lawsuit.

A witness is not treated as an expert witness, and the limitations under the Federal Rules of Civil Procedure on discovery from "expert" witnesses do not apply, with respect to information "not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness." *See*, Fed.R.Civ.P. 26(b)(4) Advisory Committee Notes. *See, Talk-N-Surf Communications, Inc. v. Gualtieri*, 1:12-MC-229, 2012 U.S. Dist. LEXIS 135164 (S.D. Miss., Sept. 21, 2012). *See also, Jones v. Celebration Cruise Operator, Inc.*, No. 11-61308, 2012 U.S. Dist. LEXIS 40502 (S.D. Fla. March 26, 2012) (recognizing "it is possible for a witness to wear two hats: one as a specially employed expert in

anticipation of litigation and one as an ordinary witness”); *Statutory Comm of Unsecured Creditors v. Motorola, Inc.*, 218 F.R.D. 325, 327 (D.D.C. 2003) (“When . . . a party seeks only factual information relating to an issue in the case, a witness cannot demand any greater compensation than any other witness merely because he or she can claim some expertise in a discipline or calling.”) Accordingly, federal courts refuse to quash subpoenas pursuant to Fed.R.Civ.P. 45(c)(3)(B)(ii) where, as here, the subpoena does not seek a non-party’s opinions (expert or otherwise) but, rather, seeks information regarding transactions or occurrences at issue in the lawsuit acquired through the witness’s involvement or observations of the same. *Talk-N-Surf Communications*, 2012 U.S. Dist. LEXIS 135164.

As set forth above, the record demonstrates that Mr. Aoun possesses relevant knowledge, acquired through his direct involvement or observations, regarding: (1) contracting and negotiations between various Michigan hospitals and commercial health insurers; (2) what, if any, affect the inclusion of an MFN in one (if not more) hospital’s contract with Blue Cross had on its contractual rates with other commercial health insurers; (3) various hospital costs and other economic factors, and the effect of the same on competition between commercial health insurers; and (4) various meetings and other public presentations regarding hospital contracting and the competitive environment for commercial health insurers in Michigan.

Because the subpoenas do not seek to compel Mr. Aoun to be an involuntary expert as Mr. Aoun contends, but rather seek the testimony and documents of an ordinary witness, the cases he cites are inapplicable. Accordingly, the subpoenas should not be quashed pursuant to Fed.R.Civ.P. 45(c)(3)(B)(ii).

**C. Mr. Aoun fails to demonstrate any basis for quashing the subpoenas for his deposition.**

Mr. Aoun's mere assertion that complying with the deposition subpoena would be burdensome is insufficient to quash the subpoena, particularly given the importance of the information sought, as outlined above. *Operating Eng'rs*, 2011 WL 1464851, at \*2; *EEOC v. Ford Motor Credit Co.*, 26 F.3d at 47.

Mr. Aoun makes no attempt to substantiate any claim that appearing for and testifying at the requested deposition would be unduly burdensome. In his affidavit in support of his Motion, Mr. Aoun states that he believes the requested deposition would be "impractical." *See*, Motion at Exhibit D, ¶ 9. Mr. Aoun's conclusory statement in this regard plainly fails to meet his evidentiary burden to quash the subpoena. October 1 Opinion and Order, 2012 U.S. Dist. LEXIS 141355, \*18.

Mr. Aoun repeatedly contends that the "opinions" he believes Blue Cross seeks are based upon and "inextricably tied to" his legal practice, and that the requested deposition presents the risk that privileged information may be revealed and must therefore be quashed. However, as stated above, Blue Cross simply seeks to depose Mr. Aoun regarding factual information he acquired through his involvement or observation in various transactions or occurrences at issue in this lawsuit. Those facts are not protected by the attorney-client privilege. Indeed, at least some of this information has already been disclosed to the DOJ, demonstrating that this argument is simply a makeweight attempt to avoid the deposition.

The party asserting attorney-client privilege bears the burden of proving its existence and applicability. *Volkswagon AG v. Dorling Kindersley Publ'g, Inc.*, No. 05-CV-72654-DT, 2007 U.S. Dist. LEXIS 4225, \*6 (E.D. Mich., Jan. 22, 2007) (Majzoub, M.J.). The elements of the attorney-client privilege are: (1) where legal advice of any kind is sought; (2) from a professional

legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser; (8) unless the protection is waived. *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998).

“It is . . . well established that attorney-client communications related to areas other than legal counseling, such as business advice, are not privileged.” *In re Search Warrant Executed at Law Offices of Stephen Garea*, No. 97-4112, 1999 U.S. App. LEXIS 3861, \*4 (6th Cir., March 5, 1999); *Taylor v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 163032, \*2 (E.D. Mich., Nov. 15, 2012). “When lawyers produce both documents containing business advice and documents containing legal advice, courts place *a particularly heavy burden* upon the proponent of the privilege to make a clear showing that allegedly privileged document actually concerns legal, as opposed to business, advice.” *Flagstar Bank v. Fed. Ins. Co.*, No. 05-CV-70950, 2006 U.S. Dis. LEXIS 58559, \*10 (E.D. Mich., Aug. 21, 2006) (Mazoub, M.J.) (emphasis added) (citing *In re Feldberg*, 862 F.2d 622, 626-27 (7th Cir. 1988); *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-cv-726, 2001 U.S. Dist. LEXIS 4561 \*18 (W.D. Mich., Apr. 3, 2001). Further, “the attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.” *In re Lott*, 424 F.3d 446, 452 (6th Cir. 2005); *see also*, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 294 (6th Cir. 2002) (“As a general rule, the attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.”)

Plainly, no information Mr. Aoun acquired from or communicated to Blue Cross, another commercial health insurer, any consultant, other hospital, or any other entity or individual he was not representing is protected from disclosure by the attorney-client privilege. The record is

replete with examples of such correspondence, and Blue Cross is entitled to depose Mr. Aoun regarding those exchanges and the underlying facts.

Moreover, any information exchanged between Mr. Aoun and any of his purported clients for the purpose of providing business advice is not privileged and is freely discoverable. Mr. Aoun has not demonstrated that information he exchanged with the various hospitals he represented regarding contracting and negotiations with Blue Cross and other commercial insurers was exchanged for the purpose of legal, as opposed to business, advice and is therefore privileged. To the contrary, evidence in the record demonstrates that Mr. Aoun's clients themselves believed that Mr. Aoun provided business consulting services with respect to certain contract negotiations, beyond any legal advice he may have also provided.

For instance, Mark Gronda, the Chief Financial Officer of Covenant HealthCare ("Covenant"), testified at deposition on December 13, 2012 that Mr. Aoun provided Covenant with business consulting advice beyond any legal services he may have also provided. *See, Exhibit F*,<sup>2</sup> p. 119. Mr. Gronda testified that Mr. Aoun provided *business* advice to Covenant regarding its negotiations with BCBSM and other commercial insurers, generally, and regarding a Medicare Advantage PPO contract with Blue Cross, specifically. *See, Exhibit F*, pp. 119, 155-157. Further, Mr. Gronda testified that he does not believe there is a direct correlation between premium increases for patients and the rates that hospitals negotiate based on charts prepared by Mr. Aoun, which Mr. Gronda specifically stated "wasn't legal advice." *See, Exhibit F*, p. 119.

Finally, any information voluntarily disclosed outside of Mr. Aoun's purported attorney-client relationships is not protected from disclosure by the attorney-client privilege because the disclosure to any third-party would waive any such privilege. Thus, any information disclosed to

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<sup>2</sup> Relevant portions of the rough draft of the transcript are attached as Exhibit F. Blue Cross has not received the final, certified transcript as of the time of this filing.

the DOJ (such as any of the statements made in the recording produced by Pennock Hospital), to a consultant, at a legislative hearing or meeting with state officials, or at a public presentation of any sort is readily discoverable. To the extent Mr. Aoun is nonetheless concerned that he may be asked questions that inadvertently seek the disclosure of privileged information, he will surely be represented by competent counsel who will, like the counsel representing the parties and third parties in this and every other litigation, instruct him not to answer the questions.

Neither the potential disclosure of privileged communications, nor the existence of any supposed burden prevented Mr. Aoun from discussing hospital contracting and negotiation and other commercial insurance competition issues with the DOJ in December of 2010, with officials from the State of Michigan in January of 2012, or at any of his various public presentations referenced in his Motion. Here, Mr. Aoun has failed to establish any basis for quashing the subpoena for his deposition, thus his Motion to quash that subpoena must be denied.

**D. Mr. Aoun fails to demonstrate any basis for quashing the subpoena seeking the production of documents.**

Similarly, Mr. Aoun has failed to demonstrate any basis to quash or otherwise modify the subpoena seeking the production of documents of the type this Court has previously held to be “highly relevant.”

As an initial matter, since the issuance of the subpoenas, Blue Cross has expressed its willingness to reasonably limit the scope of the document requests in order to minimize the burden upon Mr. Aoun and his Firm. As stated in his Motion, Mr. Aoun made an initial production of “public documents,” however that production was devoid of any contracting or negotiation documents or materials, reference to his communications with the DOJ, or documents or materials relating to his meeting with officials for the State of Michigan. At the time of his production Mr. Aoun advised, as he contends in his Motion, that other documents

exist but were not produced either because the documents themselves are privileged or because they are stored with other documents that are privileged.

Mr. Aoun's objections in this regard fail to establish any basis to quash Blue Cross's document requests. As stated above, no information obtained by Mr. Aoun when providing business advice, as opposed to legal advice, is privileged or otherwise protected from disclosure. *In re Search Warrant*, 1999 U.S. App. LEXIS 3861, \*4; *Taylor*, 2012 U.S. Dist. LEXIS 163032, \*2. Evidence in the record demonstrates that Mr. Aoun was acting, at least in part, as a business advisor with respect to contracting and negotiations between his hospital clients and Blue Cross and other commercial insurers, and Mr. Aoun has yet to demonstrate that any documents in his possession concern legal, as opposed to business, advice. *Flagstar Bank*, 2006 U.S. Dist. LEXIS 58559, \*10. Further, no documents disclosed to other parties to the negotiations, the DOJ, the State of Michigan, or otherwise outside of Mr. Aoun's purported attorney-client relationships are privileged as disclosure to a third party waives any privilege that may exist. *In re Lott*, 424 F.3d at 452. Accordingly, contrary to Mr. Aoun's assertions, the vast majority of contracting and negotiation documents would not be privileged.

Nonetheless, in order to minimize whatever burden may exist to collect responsive documents, Blue Cross is willing to agree to the same litany of accommodations and limitations to the scope of the subpoena it has proposed to other non-parties. For instance, Blue Cross is willing to accept a search of files known to have responsive documents and not require a search for "all documents." Further, Blue Cross is willing to allow key word searches on active emails, and agrees that Mr. Aoun and his Firm need not search archive tapes or off-site storage. Moreover, Blue Cross is willing to send its own attorney to Mr. Aoun's Firm to search files and copy responsive, non-privileged documents at Blue Cross's expense. This list is not exhaustive,



as Blue Cross is willing to work with Mr. Aoun and his Firm to reduce the burden of producing the relevant information requested. Such accommodations have not been afforded to date based solely on Mr. Aoun's willingness to produce only "public documents" based, at least in part, on his unfounded assertion of privilege.

Mr. Aoun's remaining objections to Blue Cross's document requests are also unfounded. Mr. Aoun objects to Blue Cross's requests for communications regarding provider agreements (Requests 1 – 4) as "overbroad on their face as they are not limited to the MFN agreements at issue in this lawsuit." Motion, p. 11. However, this Court previously rejected this objection, holding that documents discussing contracting and negotiation of commercial health insurance contracts "specifically relate to [Blue Cross's] competitors' negotiations with the Hospitals and how those negotiations were impacted by the MFN clauses, even if the documents do not specifically mention [Blue Cross] or the MFN clauses." October 1 Opinion and Order, 2012 U.S. Dist. LEXIS 141355, \*18. Thus, Mr. Aoun's objection is unfounded.

Mr. Aoun objects to Blue Cross's requests for documents regarding hospital shortfall coverage, compensation for bad debt or uncompensated care, communications regarding PA 350, and his analysis of Blue Cross's positions in this litigation (Requests 6 – 11) as either irrelevant or the subject of his expert opinion. But Mr. Aoun has demonstrated personal knowledge regarding the extent of shortfalls, bad debt, and uncompensated care on hospitals, and the extent to which that affects hospital's rates with commercial health insurers. [REDACTED]

As demonstrated above, the information requested is plainly relevant to the claims and defenses asserted in this lawsuit. Moreover, the information is not "expert opinion," as it is factual information based Mr. Aoun's own actions and observations.

Similarly, Mr. Aoun objects to Blue Cross's request for communications with Plaintiffs regarding this litigation and Blue Cross's "contracting practices" as both overbroad and calling for his opinions. Again, any documents regarding Blue Cross contracting practices are relevant to the central issues in this case, and factual information regarding Mr. Aoun's involvement and observations of those relevant transactions does not constitute expert opinion.

Finally, Mr. Aoun objects to Blue Cross's request for proof of an attorney-client relationship with Aetna (Request 12) as irrelevant. The relevance of this request is demonstrated within Mr. Aoun's Motion and his repeated assertion of privilege emanating from that very relationship. Mr. Aoun bears the burden of establishing the existence of the attorney-client privilege if he is to invoke it as a shield from the requested discovery. *Volkswagon AG*, 2007 U.S. Dist. LEXIS 4225, \*6. To do so, Mr. Aoun must demonstrate the existence of an attorney-client relationship. To that end, Mr. Aoun is not only obligated to produce documents establishing the existence of an attorney-client relationship with Aetna, but also each and every hospital, consultant, association, or other entity with whom he claims to represent and regarding which he withholds discovery on the basis of privilege.

### **III. CONCLUSION**

For the reasons stated above, Blue Cross respectfully requests that this Court deny non-parties Joseph A. Aoun's and Nuyen, Tomtishen and Aoun, P.C.'s Motion to Quash Subpoena and enter an order compelling the production of the discovery requested by the subpoenas at issue.

Respectfully submitted,

/s/ Patrick B. Green

Joseph A. Fink (P13428)

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to, and that a copy of the sealed documents will be e-mailed to, the following:

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Respectfully submitted,

/s/ Patrick B. Green

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# EXHIBIT B

NUYEN, TOMTISHEN AND AOUN, P.C.  
640 Griswold Rd.  
Northville, Michigan 48167  
248-449-2700

June 2, 2004

FROM THE DESK OF:  
Joseph T. Aoun

TO: Kevin Seitz

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I enclose for your files a copy of the letter summarizing the deal with Michigan Hospital Group.

I wanted to thank you again for your efforts in bringing this matter to a conclusion.

*Thanks*

*Joe* **RECEIVED**

JUN - 4 2004

KEVIN L. SEITZ

---

**CONFIDENTIAL**  
**BLUECROSSMI-07-001256**

LAW OFFICES

**NUYEN, TOMTISHEN AND AOUN, P.C.**

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NORTHVILLE, MICHIGAN 48167  
248-449-2700  
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Joseph T. Aoun  
248-735-6920 (direct)  
jta@ntlaw.com (email)  
Admitted in Michigan and Florida

June 2, 2004

Mr. Mark Johnson, CPA  
Vice President  
Provider Contracting and Quality Assessment  
Blue Cross Blue Shield of Michigan  
600 Lafayette East - J744  
Detroit, MI 48226-2998

**Re: Michigan Hospital Group, Inc.**

Dear Mark:

Thank you again for meeting with me and the senior management of the participating hospitals in Michigan Hospital Group, Inc. on Thursday, May 27, 2004. We are grateful that we were able to resolve our negotiations concerning payment rates, and I am writing to summarize the key terms of the settlement. As I mentioned, some of the hospitals need to present this proposed settlement to their respective Boards, and as a result, this settlement is subject to Board approval in those cases.

1. **Payment Increase.** The overall increase to the four Michigan Hospital Group participating hospitals (Community Health Center of Branch County, Gratiot Community Hospital, Memorial Medical Center of West Michigan and Pennock Hospital) will be \$2.8 million.
2. **Allocation of Increase.** The increase will be allocated among the participating hospitals pursuant to the allocation percentages that we had previously furnished to you in our December 19, 2003 letter: Community (37.7%); Gratiot (27.7%); Memorial (14.5%); and Pennock (20.1%).
3. **Effective Date.** The increase will be effective March 1, 2003. In lieu of revising payment rates for each hospital's 2003 fiscal year, Blue Cross will make a prorated cash reconciliation payment to each hospital based on the period beginning March 1, 2003 through the end of that hospital's 2003 fiscal year. The payment will be made within two weeks of the execution of each hospital's Letter of Understanding, as described in paragraph 8 below. With respect to each hospital's 2004 payment rates, Blue Cross will revise those payment rates effective on the first day of

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**NUYEN, TOMTSHEN AND AOUN, P.C.**

Mr. Mark Johnson  
June 2, 2004  
Page 2

each hospital's 2004 fiscal year. The \$2.8 million increase for 2004 will be built into the inpatient and outpatient payment rates for both the Traditional and Trust products on a proportional basis using the most recent claims volume activity. Although not discussed, we assume that Blue Cross will make an appropriate adjustment to interim payments to reflect the increase as well.

4. **PPO Differentials.** Each hospital's inpatient PPO differential will be established at 90% of the Traditional inpatient rate. The overall annual impact of such adjustment is expected to result in an increase in payment to the hospitals in the amount of approximately \$180,000 annually. This increase is included within (not in addition to) the \$2.8 million increase discussed in paragraph 1 above. Accordingly, in order to ensure that the hospitals receive the full value of the \$2.8 million increase effective March 1, 2003, the impact of the change in PPO differentials will also be effective March 1, 2003.
5. **Most Favored Nation.** Each hospital will covenant that the payment rates which it has with Blue Care Network, Blue Cross Traditional and Blue Cross Trust are at least as favorable as the payment rates which it has established to any other commercial HMO, PPO or insurer (excluding any commercial HMO, PPO or insurer in which the participating hospital is an owner and excluding arrangements where the participating hospital has assumed financial risk). To verify compliance with the foregoing, a third party auditor will be used. Comparison of rates will be made on an overall basis and not on a specific service line basis, such as comparing only inpatient rates. In the event of a breach of this obligation, an appropriate reconciliation adjustment will be made.
6. **Duration.** The arrangement described above will apply through each hospital's 2006 fiscal year. With respect to the 2004 rate development (and the development of rates for subsequent periods), the standard rating methodologies applicable to the Traditional and Trust products (such as the application of incentives and Reimbursement Committee update factors) will be applied. Blue Cross has indicated that it is in discussions with the Michigan Health and Hospital Association about possibly changing payment policies or rates with respect to rural hospitals. You have indicated that if any of those changes would result in additional payment to the participating hospitals, those changes would be made during the term of this arrangement. In other words, the understandings reached herein do not prevent the hospitals from

**NUYEN, TOMTSHEN AND AOUN, P.C.**

Mr. Mark Johnson  
June 2, 2004  
Page 3

participating in further rate or payment improvement that may arise from the Blue Cross/MHA discussions.

- 7. **Appeals.** As we have discussed, one or more of the hospitals may pursue appeals of the wage index classification. You have indicated that any appeal rights which the hospitals may exercise will continue notwithstanding this arrangement, and this arrangement will not be used against the hospitals in the event such appeals are pursued.
- 8. **Letters of Understanding.** The parties will work in good faith to complete specific Letters of Understanding for each of the four hospitals.


I trust the foregoing accurately summarizes our discussions. If you concur, please execute this letter below and return a signed copy to me. If you believe that this letter does not reflect our understandings, please advise me immediately.

Thank you again for your cooperation.

Very truly yours,

  
Joseph T. Aoun

ACCEPTED AND AGREED TO:

  
Mark Johnson, Vice Resident

6/2/04

JTA/grp

NO018833

# **EXHIBIT D**

# Health Reform and Leveling the Playing Field

## Michigan Association of Health Plans

Joseph T. Aoun, Esq.  
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July 2012

# Context

- **ACA-related Amendments:** The Insurance Code, including the HMO provisions in Chapter 35, and Public Act 350 will need to be amended to address the ACA provisions affecting health plans
- **Exchange Legislation:** New enabling legislation is needed to implement the Exchange
- **What else should Michigan be doing to promote a level playing field and robust competition?**
  - ACA-related amendments and Exchange enabling legislation do not address the goal of leveling the playing field
  - Michigan has unique market characteristics

# Dimensions to Improve a Level Playing Field

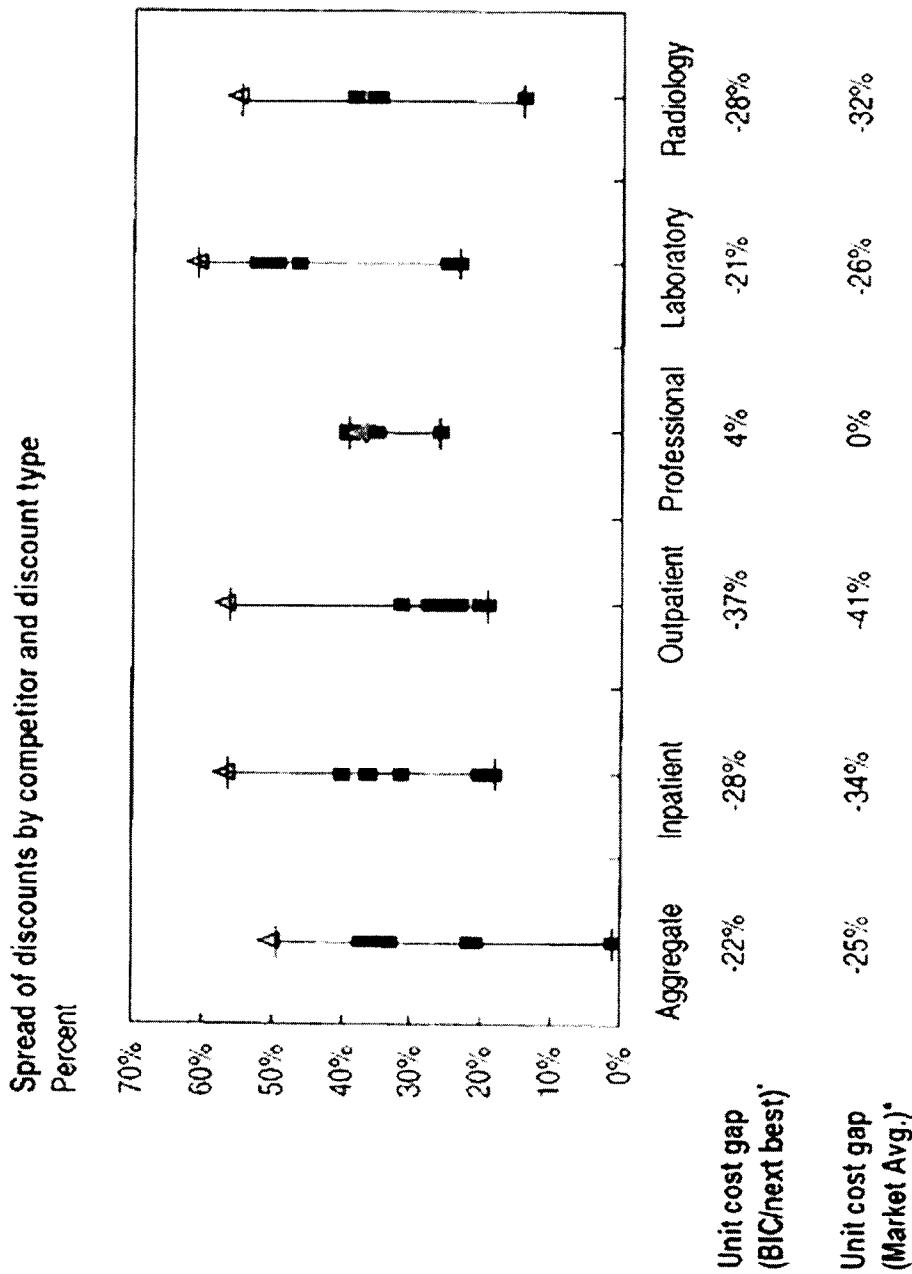
- Provider Payment Rates
- Premium Rates
- Product Distribution
- Transparency

# Provider Rates

- # ACA does not address provider payment rates for commercial business, but ACA requires commercial carriers to offer comparable (essential health) benefits and follow the same underwriting rules (e.g., guarantee issue; no pre-existing conditions)
  - If all health plans are essentially insurers of last resort, how will they compete if they do not have insurer of last resort provider rates?
- # Reducing unmerited variation in payment to providers is essential to ensuring a competitive market both within and outside of the Exchange

## BCBSM's has greater discounts than all competitors except in professional

▲ BCBSM discount  
 ■ Competitor discount





# Provider Rates – Strategies to Level the Playing Field

- **Risk adjustment** – needs to ensure that provider rate differentials are appropriately taken into account
  - Even if a dominant health plan’s members are 10% sicker than average, given the unit cost advantage, it should not receive positive risk adjustment
  
- **Rate Parity** - Evaluate ability to implement commercial rate parity within Exchange
  - May need to apply outside of Exchange given ACA requirements
  - CMS Innovations Center may test all-payor rate setting under ACA

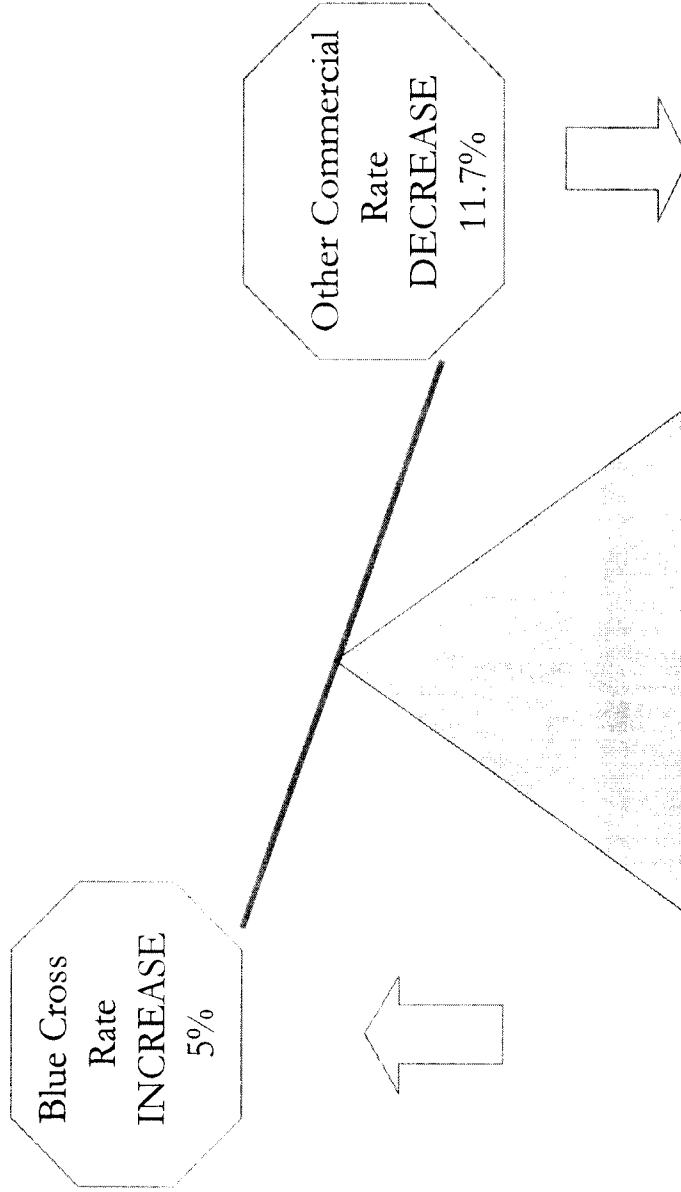
# Provider Rates – Strategies to Level the Playing Field

- **Hospital Financial Requirements - Obligation to pay fair share of hospital financial requirements so that the costs are not disproportionately shifted to other health care purchasers**
  - If hospital financial requirements are **130.9%** of cost and BCBSM pays 109%, then other carriers end up paying **182%** of cost
  - **Increased government shortfalls** expected as Medicaid enrollment grows and Medicare payment cuts under the ACA are implemented
- **Hospital Appeals to OFIR or Third Party – An appeal process for hospitals that believe their financial requirements are not being paid**

# Provider Rates – Strategies to Level the Playing Field

- ## Most Favored Nation Clauses - Should be prohibited
  - Status of current litigation against BCBSM
  
- ## Provider Association Roles - Determine scope of role, if any, of hospital and physician trade associations relative to development of standard contracts (Participating Hospital Agreement) and reimbursement models
  - *Not limited to BCBSM, but all payors*

# Multiplier Effect on other Commercial Rates of Raising Blue Cross Rates



# Premium Rates

- **Avoid predatory pricing (both within and outside of Exchange) by dominant health plans**
  - Consider requirement to price rate increases at least equal to trend
  - Consider requirement for increased OFIR auditing of actual rate increases to ensure rates charged are consistent with the rates that have been filed and approved

## • **Other Rating Considerations**

- Determine whether a separate rate review process is appropriate given dominant health plan market share

# Premium Rates

## AMA 2011 Analysis of health plan concentration

	<u>BCBSM</u>	<u>Other</u>
Ann Arbor	80%	7% (HAP)
Detroit-Livonia-Dearborn	55%	26% (HAP)
Flint	68%	16% (HealthPlus)
Grand Rapids-Wyoming	65%	22% (Priority)
Jackson	85%	7% (Aetna)
Kalamazoo-Portage	74%	15% (United)
Lansing-East Lansing	67%	12% (PHP)/12% (Priority)

## Defining dominance: More than 50%?

# Premium Rates

- **Other Rating Considerations**
  - Politics and rate hikes
    - AG settlement with BCBSM artificially depresses Medicare supplement rates, thus weakening competition in the **Medicare supplement** and **Medicare Advantage** markets
  - Establish standards for experience rating plans to promote ability of experience rated customers to switch carriers without incurring penalties or losing accumulated credits

# Product Distribution

## ■ Chamber and Association Agreements

- Consider prohibiting dominant health plans from compensating chambers and associations unless non-exclusive, i.e., chamber and association must offer competing health plans in order to receive any remuneration from a dominant health plan

## ■ Agent Relationships

- Require disclosure of agent commission and override arrangements
- Address risk that agent compensation will be structured to avoid enrolling unhealthy, e.g., less broker commission for higher metal plans



# Product Distribution

## License Agreements and Territorial Restrictions

- Require disclosure of license and territorial restriction agreements, such as BCBSA licensing agreement, and remuneration paid to/by other health plans under same agreement

# Transparency

- Increase appropriate regulatory disclosures
- Examples of what is **not** reported today:
  - In-state versus out-of-state enrollment
  - Group enrollment where Medicare is primary
  - Stop loss enrollment
  - Claims processed by BCBSM and paid by other Blues' plans
  - Utilization statistics, such as admissions and days/1000
  - Agent compensation & Chamber arrangements

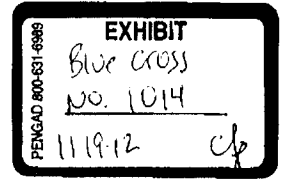
# Transparency

## ■ Self-Funded Health Plan Reporting:

- Require full disclosure of all access fees and other administrative fees
- Consider prohibiting access fees based on percentage of paid claims
- Consider prohibiting access fees based on a single class of providers (e.g., charging access fee on hospital claims only)

# **EXHIBIT E**

**From:** BRUCE HILL [BHILL@healthplus.org]  
**Sent:** Tuesday, January 31, 2012 11:24 PM  
**To:** Richard Murdock  
**Subject:** RE: Summary of Meeting with Governor's staff



Rick-

Thank you for the summary. Very helpful. Sounds like the team did as good as could be expected. Also sounds like the administration was receptive. Thank you and the team for your advocacy for a Competitive Michigan market.

Bruce

**From:** Richard Murdock [mailto:RMurdock@mahp.org]  
**Sent:** Tuesday, January 31, 2012 4:42 PM  
**Cc:** 'Kathy Kendall'; Paul Duguay; 'Aoun, Joseph T.'; 'steve mitchell'  
**Subject:** Summary of Meeting with Governor's staff

TO: MAHP CEOs and Executive Committee and Board Alternates

Attached and below a summary and information provided at today's meeting with the Governor's senior staff on "Competitive Environment". (The agenda was distributed last night—the appendices you may have seen in partial form in the package for last week's meeting).

1. **Attendance:**

Governor Office:

- Legislative Affairs
  - i. Dick Posthumus, Senior Advisor and Director of Office of
- Affairs
  - ii. Sally Durfee, Deputy Director of Office of Legislative
- Regulatory Affairs, LARA
  - iii. John Nixon, State Budget Director
  - iv. Steve Hilfinger, Director of Department of Licensing and
  - v. Kevin Clinton, Insurance Commissioner, (OFIR)

vi. Nick Lyons, Deputy Director, MDCH

MAHP:

- i. Kathy Kendall, MAHP Board President
- ii. Rick Murdock, MAHP Executive Director
- iii. Paul Duguay, MAHP Deputy Director
- iv. Joe Aoun, MAHP Consultant
- v. Steve Mitchell, MAHP Consultant

2. **Overview.** The meeting lasted just over 1 hour and began with conversation with John Nixon, regarding issues related to BlueCaid/Wayne County. I will have a separate communication tomorrow regarding this topic and status, but we took the opportunity to make sure he was well aware of the MAHP position on the timing of any rebid of the Medicaid Program. Mr. Nixon then left the meeting and Dick Posthumus set the stage for the rest of the meeting by referencing his presentation to our MAHP Board. Our presentation was to review the agenda items (making sure we left enough time to discuss the "recommendations", but taking the group through the various attachments in the appendix. I also took the time to thank the Governor's office of having such a meeting as the previously administration didn't permit this discussion.

3. **Specific Comments/Observations by Governor's staff (appendices):**

Appendix 1 (draft Vision)—no specific comments, but indication that was the position they were seeking

Appendix 2 (ASO)—Commissioner Clinton asked some pointed questions to determine if we had asked for this previously, he affirmed the competitive edge this provides and could be one area to address

Appendix 3 (exclusive marketing agreements with chambers and associations) was for awareness purposes to illustrate the pervasive reach of BCBSM and was an "eye opener" for several in the room, regarding the magnitude of the reach and how those relationships work back into the legislative process.

Appendix 4 (Litigation summary)—again was to highlight for the group the numerous challenges raised by customers as well as the Federal and state government—opportunity was taken to provide more detail on some of the cases

Appendix 5 (status of competition)—again was education/awareness... We showed the most recent compilation of the HHI index by region and it clearly shown everyone the dominant position of BCBSM... several questions were raised on the formula for HHI. Appendix 5 also highlighted a quick summary of the past five years.

Appendix 6 (PA 350 provisions)... this was to acknowledge that the provisions of PA 350 do not address the bulk of current BCBSM enrollment due to vast expansion of self insured and nontraditional plans since the origin of the act. There was significant discussion on the provider class issues and it was noted that MAHP would submit commentary on OFIR's request for comments on the provider class requirements and would encourage members as well. Discussion also took place regarding the opportunity to seek information from Hospitals (or which hospitals have already provided) that would demonstrate the inequity of payments relative to charges of BCBSM compared to other payers and how that was inconsistent with the principle embedded in PA 350 that no portion of BCBSM fair share of hospital financial requirements be borne by other health care purchasers.

#### **4. Recommendations.**

At the outset, we attempted to be very clear that the recommendations were both our initial thinking and that should be taken as a group—in other words, if the administration were to seek a "pay down of assets" but not take any other action, then competitive environment would have not been addressed.

---

It was clear that there was significant advanced thinking regarding the ending of the "insurer of last resort" —as there was no question that currently this was a very limited role they play—due to the federally subsidized HIP program and medicaid —there were questions regarding potential payout of assets—we were asked potential uses of those dollars. Our recommendations on exclusive arrangements and cost shifting were understood, given discussion on the information in the appendices—the pitch was made that while we don't believe new regulations are necessary in the marketplace, the administration should look at appropriate actions in these areas when a carrier exceeds the threshold of monopoly (using the HHI index as example)

The meeting ended with discussion on how the administration should not take off the table there key leverage points for creating the competitive environment—the same arguments used with John Nixon at the start of the meeting regarding the inappropriateness of rebidding Medicaid before 2014 was again discussed and with the context of the various other pieces of information clearly make impact with those in the room—that is—why would you reward BCBSM who has demonstrated a clear history of monopolistic behavior by given them the keys to Medicaid—the only current market in Michigan that is competitive.

#### **5. Conclusion of meeting and follow up**

Our meeting ended with Steve Mitchell driving home the points of BCBSM history in IMR and their claims vs. actual and placing that in the context of a vision for competitive environment. We agreed

to stay in communication—that follow up on Medicaid issues will take place with Nick Lyons (copied to others)—we will continue to work cooperatively on exchange legislation (our activity was noted and we were thanked). There is a similar meeting with BCBSM on Thursday, and the Administrations' position will then evolve—how quickly is yet to be determined.

**Footnote:** We had a separately scheduled meeting with Nick Lyons already in place after lunch today. Our original agenda was deferred and we discussed the debriefing of what was heard—part of the conversation was on Bluecaid/Wayne county and Nick indicated he will follow up with me tomorrow to address the issues raised by John Nixon—I will forward a separate memo on that time. However, one piece of information he shared was that the "administration's current position on rebidding the Medicaid program" appears to be solely related to the recently discussed strategic plan presented by Olga Dazzo to John Nixon of steps needed to get ready for 2014....and that John Nixon was not likely wedded to that position if we could persuade Director Dazzo of its inappropriateness at this time. More tomorrow on this as well.

The MAHP Team were very focused and I believe the message we intended to bring to the Administration was well received and will be considered.

---

If there are any questions on the above or attachments, please give me a call (517-371-3181) or message at [rmurdock@mahp.org](mailto:rmurdock@mahp.org)

Rick

Rick Murdock

Executive Director

Michigan Association of Health Plans

327 Seymour Avenue

Lansing, Michigan 48933

517-371-3181 (office)



517-482-8866 (fax)

[Rmurdock@mahp.org](mailto:Rmurdock@mahp.org)

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# **EXHIBIT F**

121213RUF.txt

1

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23  
24  
25

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1

UNITED STATES DISTRICT COURT

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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 Confidential Videotaped Deposition of

MARK GRONDA,

Taken at 4960 Towne Centre Road,

Saginaw, Michigan,

Commencing at 10:08 a.m.,

Thursday, December 13, 2012,

Before Rebecca L. Russo, CSR-2759, RMR, CRR.

3

1 APPEARANCES:

2

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4 U.S. Department of Justice

5 Antitrust Division

121213RUF.txt

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23

24

25

4

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9

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9 witness.  
10  
11  
12 ALSO PRESENT:  
13 Rachel Bierl - Video Technician

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1 Saginaw, Michigan  
2 Thursday, December 13, 2012  
3 10:08 a.m.

4  
5 VIDEO TECHNICIAN: We are now on the  
6 record. This is the videotaped deposition of Mark  
7 Gronda, being taken on Thursday, December 13th, 2012.  
8 The time is now 10:08 a.m.

9 We are located at 4960 Town Centre Road,  
10 Saginaw, Michigan.

11 We are here in the matter of United States  
12 of America, et al, versus Blue Cross Blue Shield of  
13 Michigan. This is Case Number 10:cv:14155.

14 This matter's being held in United States  
15 District Court, Eastern District of Michigan, Southern  
16 Division.

17 My name is Rachel Bierl, video technician.

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1 A. That's what it says.

2 MR. ALLEN: Objection, form, foundation.

3 BY MR. STENERSON:

4 Q. And how did that compare how did that increase compare  
5 to what you were seeking?

6 A. It was far less than we had hoped for.

7 Q. what would you say to somebody, sir, who suggested to  
8 you that Blue Cross paid you too much even in Gronda  
9 2?

10 MS. ALEXANDER: Objection, form.

11 MR. ALLEN: Form, incomplete hypothetical?

12 A. If someone told me Blue Cross paid us too much.

13 Q. Hmm-hmm?

14 A. I'd say they're crazy.

15 Q. why?

16 A. Because I don't believe they do pay too much.

17 Especially as it pertains to the other payers and --

18 Q. Do you believe that, what would you say to someone,  
19 sir, who says that Blue Cross should never give you a  
20 rate increase because every time it does so the cost  
21 of health care simply just gets higher?

22 MR. ALLEN: Objection, form.

23 MS. ALEXANDER: Objection, form.

24 A. I would say there's not a direct correlation between  
25 the premium increases and the rates that the hospitals

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1 negotiate and I've seen charts to that effect.

2 BY MR. STENERSON:



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3 Q. I was about to ask you what's the basis for that  
4 claim?

5 A. Charts that Joe Aoun put together that I've seen.

6 Q. And whose Mr. Aoun?

7 MR. FABIEN: Again, at this point I'm going  
8 to object to the extent we're getting into legal  
9 advice. If it's business advice, it's a different  
10 matter, but to the extent we're talking about legal  
11 advice from Mr. Aoun --

12 A. This wasn't legal advice. This wasn't a document for  
13 Covenant, per se. It's one he put together. I think  
14 he actually testified at the MHA or Lansing here  
15 recently.

16 Q. And I'm not intentionally trying to elicit answers of  
17 privilege, and so to the extent I do ask questions  
18 that call for privilege just tell me and we won't have  
19 you answer.

20 My original question is who is Mr. Aoun?

21 A. He's a lawyer that we've utilized through the PHO for  
22 legal services.

23 Q. And do I understand Mr. Aoun also provided business  
24 consulting beyond legal services?

25 A. Yes.

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1 Q. And on what topics has he provided business consulting  
2 advice to Covenant?

3 A. The structure that we negotiated with HealthPlus and  
4 he's given us some advice on the Blue Cross  
5 negotiations, both legal and some that would be  
6 considered business.

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7 Q. And has Mr. Aoun ever told you that he has an  
8 attorney-client relationship with Aetna?

9 MR. ALLEN: Objection, form.

10 A. Not that I recall.

11 BY MR. STENERSON:

12 Q. You had mentioned earlier, sir, that it was your  
13 understanding that Blue Cross had always had an MFN?  
14 Did I understand that testimony correctly?

15 A. That was my recall, that that was not anything new,  
16 that most favored nation clause was pretty standard.

17 Q. Okay. And I just want to test your memory a little  
18 bit and make some distinctions between Blue Cross  
19 getting the best price and Blue Cross having a  
20 contractual clause for the best price, okay?

21 A. Okay.

22 Q. Do you know if Covenant -- well, strike that.

23 Prior to Gronda 2, have you ever negotiated  
24 a contractual clause with Blue Cross for the best  
25 price at a Michigan hospital?

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1 A. Me personally?

2 Q. Yes, sir.

3 A. No.

4 Q. Prior to Gronda 2, do you know whether Covenant has  
5 ever had a written agreement with Blue Cross that  
6 contained a contractual guarantee of the best price?

7 A. My understanding was that we did.

8 Q. And what is the source of your understanding?

9 A. Just from conversations back at the time with the  
10 individual who was leading those negotiations, but I

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5 competition? Yes.

6 Q. And so if that's true, sir, if everybody else's rates  
7 at Covenant stay the same but Blue Cross' rates to  
8 Covenant go up, what would you expect that to do to  
9 competition for health insurance in or around Saginaw?

10 MS. ALEXANDER: Objection, foundation.

11 A. If Blue Cross' rates went up? I assume that would be  
12 beneficial to the competitors.

13 BY MR. STENERSON:

14 Q. And do you think -- strike that.

15 Let me hand you what I'm going to mark as  
16 1307, Blue Cross.

17 MARKED FOR IDENTIFICATION:

18 BLUE CROSS EXHIBIT 1307

19 4:54 p.m.

20 BY MR. STENERSON:

21 Q. Blue Cross 1307 is an email correspondence from is it  
22 Mr. Albosta?

23 A. Correct.

24 Q. To you? And there's a -- I'd like to direct you to  
25 the top email. It's dated October 15, 2009. I

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1 believe you're the author, but that's my first  
2 question, if you could read -- I can't tell -- and  
3 maybe I'll just ask this, if you would read the  
4 opening paragraph and tell me if you can --

5 A. where are we?

6 Q. very top of the page, 1307?

7 A. Albosta's email to me.

8 Q. That's my question. Do you think that's an email from

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- 9 him to you or you to him?
- 10 A. That's in Kevin to me.
- 11 Q. Okay. So when he says Jerry and I talked to about
- 12 this yesterday you believe that's a reference to Jerry
- 13 and Kevin?
- 14 A. I'm just, I'm trying to figure out why my name is at
- 15 the bottom that's confusing but --
- 16 Q. That's the source of my question?
- 17 A. Yeah. Yeah, Jerry is in Kevin's department so I'm
- 18 sure that that's the reference they were making.
- 19 Q. Okay. So Mr. Albosta continues: I think they might
- 20 have taken care of some of the issues, but are we
- 21 comfortable with Joe Aoun's issue of how much market
- 22 share do we want to give the Blues. Do you see that?
- 23 A. I do.
- 24 Q. Do you know what that's a reference to?
- 25 MR. FABIEN: Objection to the extent we're

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- 1 seeking, you know, to reveal any legal advice from Joe
- 2 Aoun. To the extent it's business advice, it's a
- 3 different matter, but.
- 4 BY MR. STENERSON:
- 5 Q. Was Mr. Aoun providing business strategy advice to
- 6 Covenant at this time?
- 7 MR. FABIEN: With respect to this issue?
- 8 MR. STENERSON: Well, more generally, my
- 9 question first, and then second was going to be this
- 10 issue.
- 11 A. Could you state it again, please?
- 12 Q. Sure. In or around October of '09, was Mr. Aoun

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13 providing business strategy advice to Covenant?

14 A. I think typically when he gets involved in these  
15 contracts he ends up kind of wearing two hats some  
16 legal advice and some business.

17 Q. Okay, let me ask this question and just it's a short  
18 answer to the first question so we can listen to your  
19 counsel's objection. Do you know, yes or no question.  
20 Do you know what this sentence is referring to?

21 A. I believe I do.

22 Q. Okay. Second question, on that line, do you believe  
23 this issue relates to the business advice that  
24 Mr. Aoun was giving you as opposed to legal advice?

25 A. The second one I'm thinking is simply business advice.

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1 Q. Okay, and by the second one you mean?

2 A. Reference to market share.

3 Q. Okay. So what does that refer to?

4 A. Market share?

5 Q. No, the specifically the issue Joe Aoun's issue of how  
6 much market share do we want to give to the Blues, to  
7 what does that refer?

8 A. By signing a Medicare Advantage contract we're only  
9 increasing Blue Cross' market share presence and  
10 dominance.

11 Q. And how is that an issue, was that an issue that you  
12 had discussed with Mr. Aoun?

13 A. Not a legal issue it was just the reality of what  
14 we've been talking about all along in terms of wanting  
15 to create more competition if Blue Cross not have such  
16 a dominant position that kind of flies in the face of

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17 that I guess I don't see that as legal advice.

18 Q. I agree with you. So had you had conversations with  
19 Mr. Aoun about whether or not Covenant should sign a  
20 Medicare Advantage PPO agreement with Blue Cross?

21 A. You're back in this time frame?

22 Q. Yes, sir.

23 A. I think we did get some legal advice from Joe as --

24 MR. FABIEN: Again, just objection to the  
25 extent we're talking about legal advice we don't want

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1 to talk about any other legal advice that we may have  
2 received.

3 A. So we did receive legal advice.

4 BY MR. STENERSON:

5 Q. Does Mr. Aoun currently provide business consulting  
6 advice to Covenant?

7 A. He provides legal services for the PHO which includes  
8 legal advice on contracting.

9 Q. Okay, so let's go to what has previously been marked  
10 as Aetna Gronda 1.

11 A. Is that the one I have that's not marked?

12 Q. Yes, sir. So the Bates Number in the bottom corner  
13 566913?

14 A. Okay.

15 Q. Specifically, if I could ask you to look at the second  
16 page, which is Bates numbered 914.

17 A. Okay.

18 Q. And I'm going to try ask the question specifically so  
19 I don't elicit an answer about legal advice. If I  
20 fail in that regard please tell me and I'm sure your

121213RUF.txt  
21 counsel will not want you to answer those.

22 MR. FABIEN: Correct.

23 BY MR. STENERSON:

24 Q. So in or around December of 2009 you were discussing a  
25 favored pricing provision with Blue Cross, correct?

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1 A. Correct.

2 Q. And ultimately did a favored pricing provision get  
3 included in Gronda 2, the LOU that was being  
4 negotiated at this time?

5 A. Yes.

6 Q. And am I correct in understanding that you executed  
7 Gronda 2 on behalf of Covenant?

8 A. I did.

9 Q. Okay. And do I also understand that you would not  
10 have agreed to any pricing provision that you thought  
11 was illegal?

12 A. Correct.

13 Q. And I think one of the other lawyers you asked this  
14 but at any time since signing the -- strike that.

15 Okay, so then going back to Aetna Gronda 1,  
16 am I correct in understanding that you on behalf of  
17 Covenant sought two legal opinions regarding the  
18 potential terms of the favored pricing provision with  
19 Blue Cross in or around December of '09?

20 A. Correct.

21 Q. And one of those legal opinions was from Mr. Aoun?

22 A. Yes.

23 Q. And the other was from is it Mr. Forsyth?

24 A. Jim Forsman.

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25 Q. Jim Forsman who at the time was a lawyer at Miller

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1 Canfield?

2 A. Correct.

3 Q. And those are the two legal opinions you were  
4 referring to in Aetna Gronda 1?

5 A. I am.

6 Q. And in the last sentence of the first paragraph, you  
7 state: while they had some concern with the fifteen  
8 percent aggregate spread, I am willing to maintain  
9 language to that effect. Correct?

10 A. That's what it says.

11 Q. And am I correct in understanding that that fifteen  
12 percent aggregate language ultimately did appear in  
13 the favored pricing provision?

14 A. It did.

15 Q. In the final agreement?

16 A. Yes.

17 Q. And then prior to that you objected, you know, quote,  
18 especially as it relates to the second bullet  
19 regarding not altering any other commercial payer  
20 contracts. Is that right?

21 A. Yes.

22 Q. And am I correct in understanding that that clause did  
23 not appear in the final pricing provision that is  
24 represented in Gronda 2?

25 A. That's my recollection.

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1 Q. well, lets particular a look at it, because I want you  
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2 to --

3 A. I that knowledge I know what the second bullet was  
4 that's my confusion.

5 Q. Oh, I see. What do you think the second bullet was.

6 A. Should I speculate.

7 MR. FABIEN: Don't speculate.

8 BY MR. STENERSON:

9 Q. Well, no, don't speculate but if you have a reasonable  
10 belief.

11 A. I believe it was related to what I said earlier, that  
12 the most favored nation clause not only had the  
13 aggregate spread, but would have prevented me from  
14 contracting at lower rates with any payer regardless  
15 of whether they were at 99 percent of charges and I  
16 wasn't going to agree to that.

17 Q. Okay well let me do it this way Mr. Gronda. Separate  
18 and I part from whether you specifically remember  
19 exactly what the issue was, are you confident that  
20 whatever that issue was you were successful in  
21 negotiating it out of the agreement?

22 A. Yes.

23 Q. And I believe you had testified earlier that you  
24 weren't going to give in on it and ultimately  
25 Mr. Darland did?

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1 A. That's what I said.

2 Q. And that's what gives you the confidence that even if  
3 your memory is not perfect as to the exact language  
4 you were objecting to you're certain that the language  
5 you didn't want in was negotiated out Al.