

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.)	

**SECOND 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]**

Pursuant to the April 20, 2018 Notice of Supplementing the Public Record Consistent with the Court’s April 17, 2018 Order [Dkt. 322], Defendant Blue Cross Blue Shield of Michigan (BCBSM) now files full versions of briefs previously filed under seal, making public material disclosed in previously-sealed filings that the Parties and Third Parties agree may be unsealed, materials that Third Parties did not move to seal, and materials that the April 17, 2018 Order has ordered unsealed or redacted as listed in Exhibit 1 to the April 20, 2018 Notice of Supplementing the Public Record Consistent With the Court’s April 17, 2018 Order. Attached hereto as Exhibit 1 is Blue Cross Blue Shield of Michigan’s Brief

in Opposition to Plaintiffs' Motion to Add and Drop Named Plaintiffs for the Proposed Class [Dkt. 127] and corresponding exhibits.

This 20th day of April.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, 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

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

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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?

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**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)

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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.”¹ 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.² Blue Cross was particularly concerned about undertaking costly discovery relating to individuals who may or may not have been members of the

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

² 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.³

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.⁴

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.⁵ Seeing that its original concerns were warranted, Blue Cross asked

³ See 10.09.2012 Oral Argument Tr. at 32.

⁴ *Id.* at 33.

⁵ 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.⁶ 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.⁷ 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.⁸

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

⁶ See Ex. 3, April 26, 2013 Cummings e-mail to Johnson.

⁷ Pls. Br. at 4.

⁸ Pls. Br. at 4-5 (emphasis added).

⁹ Pls. Br. at 2.

how MFNs affected the currently defined class. This is not surprising given the hospital testimony described above.¹⁰ 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.”¹¹

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.”¹² 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.¹³ As should be obvious, Blue Cross cannot properly prepare its defenses without being told

¹⁰ 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”).

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

¹² See Ex. 5, June 13, 2013 Small letter to Stenerson at 2.

¹³ 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.¹⁴ This is no different than what Plaintiffs alleged with respect to the named plaintiffs they now wish to drop.¹⁵ 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.¹⁶

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

¹⁴ Pls. Br. at 11.

¹⁵ *See, e.g.*, Consolidated Amended Complaint ¶ 19-24.

¹⁶ 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.¹⁷

¹⁷ 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.”¹⁸ 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.¹⁹

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.²⁰ 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.²¹ 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.”).

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

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

²⁰ See Pls. Br. at 6, Heading II.a.

²¹ 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.²² 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.²³ 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”).

²² 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.

²³ 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.²⁴ It is not sufficient for a named plaintiff to assert injury suffered by other members of the proposed class (or other named plaintiffs).²⁵

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)

²⁴ 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.").

²⁵ *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,²⁶ did not cause the hospitals to refuse to lower any competitor's rates,²⁷ did not result in any hospital terminating any competitor's contract with that hospital,²⁸ and did not cause any hospital to refuse to contract

²⁶ See, e.g., Ex. 6, Bjella Dep. (Alpena, Dec. 13, 2011) at 204:8-205:12, 229:22-230:8, 230:12-231:1, 231:9-18, 236:7-12, 264:10-22; 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; Ex. 9, McGuire Dep. (Ascension/St. John Providence, Aug. 14, 2012) at 186:18-187:14, 188:14-16, 230:12-16, 232:16-22, 245:9-15; Ex. 10, Johnson Dep. (Beaumont, Oct. 30, 2012) at 195:7-196:10; Ex. 11, Matzick Dep. (Beaumont, Nov. 13, 2012) at 141:11-21; Ex. 12, Vitale Dep. (Beaumont, Nov. 12, 2012) at 65:21-66:8; 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; Ex. 16, Susterich Dep. (Metro Health, Nov. 20, 2012) at 60:12-61:16, 190:19-195:25; Ex. 17, Rodgers Dep. (MidMichigan, Dec. 7, 2012) at 152:11-16; Ex. 18, Leach Dep. (Munson, March 15, 2012) at 301:5-302:3; Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 157:1-6.

²⁷ See, e.g., Ex. 6, Bjella Dep. (Alpena, Dec. 13, 2011) at 255:19-256:5; 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; Ex. 9, McGuire Dep. (Ascension/St. John Providence, Aug. 14, 2012) at 187:15-188:19, 254:14-19; Ex. 11, Matzick Dep. (Beaumont, Nov. 13, 2012) at 166:16-22; 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; Ex. 16, Susterich Dep. (Metro Health, Nov. 20, 2012) at 60:17-22, 210:1-6; Ex. 17, Rodgers Dep. (MidMichigan, Dec. 7, 2012) at 173:11-16, 174:21-24, 178:25-179:10, 185:5-8; Ex. 18, Leach Dep. (Munson, March 15, 2012) at 295:25-296:14, 297:5-18; Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 158:7-24.

²⁸ 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; Ex. 9,

with any commercial payor.²⁹ Indeed, as multiple hospital deponents explained, *no* commercial payers were affected in *any way* by the MFN-plus clauses.³⁰ 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

McGuire Dep. (Ascension/St. John Providence, Aug. 14, 2012) at 189:9-11, 214:10-15; 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; Ex. 16, Susterich Dep. (Metro Health, Nov. 20, 2012) at 195:9-13; Ex. 18, Leach Dep. (Munson, March 15, 2012) at 264:16-25; Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 155:2-6, 160:18-21.

²⁹ See, e.g., Ex. 6, Bjella Dep. (Alpena, Dec. 13, 2011) at 236:19-237:2; 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; Ex. 9, McGuire Dep. (Ascension/St. John Providence, Aug. 14, 2012) at 188:20-23; Ex. 11, Matzick Dep. (Beaumont, Nov. 13, 2012) at 166:24-167:3; 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; Ex. 20, Smith Dep. (Kearny Street Consulting, discussing Marquette negotiations, Nov. 9, 2012) at 176:12-179:11; Ex. 16, Susterich Dep. (Metro Health, Nov. 20, 2012) at 182:5-16; Ex. 17, Rodgers Dep. (MidMichigan, Dec. 7, 2012) at 234:3-9; Ex. 18, Leach Dep. (Munson, March 15, 2012) at 264:11-15, 267:13-23; Ex. 19, Reichle Dep. (Sparrow, Aug. 8, 2012) at 155:2-6, 160:6-17.

³⁰ 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; Ex. 11, Matzick Dep. (Beaumont, Nov. 13, 2012) at 155:8-13; Ex. 13, Marcellino Dep. (Botsford, Sept. 6, 2012) at 75:11-77:12, 84:14-85:1, 133:25-134:7; Ex. 18, Leach Dep. (Munson, March 15, 2012) at 163:2-5, 269:5-17; 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.³¹ Without knowing what class definition Plaintiffs propose, Blue Cross cannot properly focus its class discovery.³² 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)

³¹ 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.

³² 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.³³ 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.³⁴ 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.³⁵ 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.³⁶ 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

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

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

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

³⁶ *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.³⁷

³⁷ 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.³⁸ Plaintiffs thus admit that Steele’s repeated allegations to the contrary are wrong.³⁹ Plaintiffs claim that they learned that Steele did not

³⁸ Pls. Br. at 2, 4.

³⁹ 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).⁴⁰ 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.

⁴⁰ 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.”⁴¹ 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.⁴²

⁴¹ Pls. Br. at 4.

⁴² 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.”⁴³ 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).

⁴³ 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.⁴⁴

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

⁴⁴ 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.⁴⁵ 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.⁴⁶ 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

⁴⁵ 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.

⁴⁶ 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 .⁴⁷ In *B & H Medical v. ABP Admin., Inc.*, discovery “failed to disclose any support for the antitrust claims asserted in the Complaint.”⁴⁸ 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

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

⁴⁸ *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.⁴⁹

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.⁵⁰ 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

⁴⁹ *Id.*

⁵⁰ 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
Brent Johnson: bjohnson@cohenmilstein.com
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**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.)	

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

Description	Exhibit
1/25/2013 Johnson Email to Cummings – FILED UNDER SEAL	1
2/26/2013 Hedlund email to Cummings – FILED UNDER SEAL	2
4/26/2013 Cummings email to Johnson – FILED UNDER SEAL	3
6/12/2013 Stenerson letter to Small – FILED UNDER SEAL	4
6/13/2013 Small letter to Stenerson – FILED UNDER SEAL	5
Bjella Deposition Excerpts (Alpena, December 13, 2011) – FILED UNDER SEAL	6
Smith Deposition Excerpts (Ascension, November 14, 2012) – FILED UNDER SEAL	7
Felbinger Deposition Excerpts (Ascension/Borgess, August 29, 2012) – FILED UNDER SEAL	8

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McGuire Deposition Excerpts (Ascension/St. John Providence, August 14, 2012) – FILED UNDER SEAL	9
Johnson Deposition Excerpts (Beaumont, November 13, 2012) – FILED UNDER SEAL	10
Matzick Deposition Excerpts (Beaumont, November 13, 2012) – FILED UNDER SEAL	11
Vitale Deposition Excerpts (Beaumont, November 12, 2012) – FILED UNDER SEAL	12
Marcellino Deposition Excerpts (Botsford, September 6, 2012) – FILED UNDER SEAL	13
Gronda Deposition Excerpts (Covenant, December 13, 2012) – FILED UNDER SEAL	14
Worden Deposition Excerpts (Marquette, December 6, 2012) – FILED UNDER SEAL	15
Susterich Deposition Excerpts (Metro Health, November 20, 2012) – FILED UNDER SEAL	16
Rodgers Deposition Excerpts (MidMichigan, December 7, 2012) – FILED UNDER SEAL	17
Leach Deposition Excerpts (Munson, March 15, 2012) – FILED UNDER SEAL	18
Reichle Deposition Excerpts (Sparrow, August 8, 2012) – FILED UNDER SEAL	19
Smith Deposition Excerpts (Kearny Street Consulting, November 9, 2012) – FILED UNDER SEAL	20

EXHIBIT 1

From: Johnson, Brent[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; tbell@whafh.com;
dgustafson@gustafsongluek.com; dhedlund@gustafsongluek.com;
eahrens@gustafsongluek.com; epm@millerlawpc.com; jef@millerlawpc.com;
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

EXHIBIT 2

From: Dan Hedlund[SMTP:DHEDLUND@GUSTAFSONGLUEK.COM]

Sent: Tuesday, February 26, 2013 11:28:02 AM

To: Cummings, Ashley

Cc: 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

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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

D. Bruce Hoffman

P55020

(Adm. E.D. Mich., DC Bar #495385)

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EXHIBIT 3

From: Cummings, Ashley
Sent: Friday, April 26, 2013 5:05 PM
To: bjohnson@cohenmilstein.com
Cc: 'DHedlund@gustafsongluek.com' (DHedlund@gustafsongluek.com); tbell@whafh.com; 'Mary Jane Fait' (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>Ashley Cummings Partner acummings@hunton.com</p> <p>Hunton & Williams LLP Bank of America Plaza, St 4100 600 Peachtree Street, N.E. Atlanta, GA 30308 Phone: (404) 888-4223 Fax: (404) 602-9019 www.hunton.com</p>
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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~~id 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) 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

~~Dated: February _____, 2013~~ ~~Dated: February _____, 2013~~

~~/s/ Alyson Oliver _____ /s/ _____ (with consent)~~

~~Alyson Oliver _____ D. Bruce Hoffman~~

~~P55020 _____ (Adm. E.D. Mich., DC Bar #495385)~~

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EXHIBIT 4



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TEL 202 • 955 • 1500
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TODD M. STENERSON
DIRECT DIAL: 202 • 419 • 2184
EMAIL: tstenerson@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

***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



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



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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 typed name.

Daniel A. Small

cc: Bruce Hoffman

EXHIBIT 6

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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 KARMON BJELLA,
Taken at 39577 Woodward Avenue, Suite 300,
Bloomfield Hills, Michigan,
Commencing at 9:35 a.m.,
Tuesday, December 13, 2011,
Before Lezlie A. Setchell, CSR-2404, RPR, CRR.

KARMON BJELLA

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1 gross charges?

2 A. I was assured at the time there were not.

3 Q. I'm sorry, sir?

4 A. I was assured at the time that we were in compliance.

5 Q. And do you know if as of today, whether there are any
6 commercial payers other than Blue Cross that account
7 for more than 3% of Alpena's gross charges?

8 A. I would bet we're still in compliance, but I don't
9 have firsthand knowledge of it.

10 Q. And am I correct in understanding then, sir, that if,
11 in fact, there are -- there were no commercial payers
12 at Alpena other than Blue Cross that had more than 3%
13 of your business at the time this was signed, the
14 clause by definition affected no one?

15 MR. GRINGER: Object to form.

16 A. Correct.

17 BY MR. STENERSON:

18 Q. And if, in fact, it's still true today that there are
19 no commercial payers other than Blue Cross Blue Shield
20 of Michigan with more than 3% of Alpena's gross
21 charges, this most favored pricing provision has
22 absolutely no effect on any of the hospital's other

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1 commercial payers today?

2 MR. GRINGER: Object to form, foundation.

3 A. I'm always afraid of absolutely. Could it weigh on
4 what we might be negotiating with someone in the
5 future? I can imagine that it could, but I don't
6 think it has.

7 BY MR. STENERSON:

8 Q. Let me ask it this way: Since January 1st, 2010, the
9 effective date of Government Exhibit 4, has the most
10 favored pricing provision on Pages 3 and 4 caused
11 Alpena to raise the reimbursement rate of any
12 commercial payer?

13 A. No.

14 Q. Has the most favored pricing provision in the Blue
15 Cross contract caused Alpena to raise the
16 reimbursement rates to Priority?

17 A. No.

18 Q. Has the most favored pricing provision in the Blue
19 Cross contract caused Alpena to raise the prices to
20 Aetna?

21 A. No.

22 Q. Has Blue Cross' contract which contains the most

KARMON BJELLA

United States of America v. Blue Cross Blue Shield of Michigan

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1 favored pricing provision caused Alpena to raise
2 reimbursement rates to United?

3 A. No.

4 Q. Sir, to the best of your knowledge, has the most
5 favored pricing provision in the Blue Cross contract
6 caused Alpena to raise its rates to any commercial
7 payer?

8 A. No.

9 Q. And, sir, has the most favored pricing provision in
10 the Blue Cross contract caused Alpena to raise the
11 price of reimbursement rates to CIGNA?

12 A. No.

13 Q. Now you had mentioned earlier, sir, that the Blue
14 Cross contract prior to this one was a ten-year term;
15 do you recall that?

16 A. Yes.

17 Q. And generally speaking, it's your view, am I correct,
18 that a long-term reimbursement contract favors an
19 insurer over a hospital?

20 A. I'm not sure I'd go that far. I think I would say
21 that a long-term contract is unsafe. The risk -- our
22 predecessors thought it was a very good contract.

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1 Definitely in hindsight it was not a very good
2 contract. Signing a long contract would put you at
3 risk for changes in the environment, and you're better
4 off negotiating more often.

5 Q. And, sir, a couple more questions with the Blue Cross
6 contract effective January 1, 2010. That's a contract
7 that Alpena signed after an arm's length negotiation;
8 is that right?

9 MR. GRINGER: Object to form.

10 A. Give me that again.

11 BY MR. STENERSON:

12 Q. Sure. Exhibit 4, sir, the January 1, 2010 contract
13 between Alpena and Blue Cross, that's an agreement
14 that you agreed to sign after engaging in an arm's
15 length negotiation with Blue Cross; is that right?

16 A. I'm not sure what arm's length means.

17 Q. Fair question. It was negotiated, right?

18 A. Correct.

19 Q. And you had a decision whether to sign or not,
20 correct?

21 A. Correct.

22 Q. And at the time you signed the agreement, you had a

KARMON BJELLA

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1 Q. You signed it on December 16th, 2009?

2 A. Correct.

3 Q. And that was three days before you signed the Blue
4 Cross agreement?

5 MR. GRINGER: Objection, misstates the
6 record.

7 A. Five days.

8 BY MR. STENERSON:

9 Q. I'm sorry, six days before you signed Blue Cross?

10 A. Yes.

11 Q. Blue Cross signed on December 22nd, '09, correct?

12 A. Correct.

13 Q. And am I correct that the way that Alpena interpreted
14 the -- strike that.

15 The Priority contract, Government Exhibit 8
16 -- I'm sorry -- Government Exhibit 9 --

17 MR. IWREY: Which exhibit are you looking
18 for?

19 BY MR. STENERSON:

20 Q. Sir, what's on the bottom there?

21 MR. IWREY: 9.

22 BY MR. STENERSON:

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1 Q. 9. Am I correct that Government Exhibit 9, the
2 Priority contract with Alpena, has an effective date
3 of January 1, 2010 through December 31st, 2014; is
4 that right?

5 A. Correct.

6 Q. And am I correct that the way that Alpena interprets
7 the Blue Cross most favored pricing provision, that
8 this contract with Priority was entered into and in
9 effect prior to the Blue Cross contract, so,
10 therefore, it was not affected by the most favored
11 pricing provision?

12 A. Correct.

13 MR. GRINGER: Object to form.

14 BY MR. STENERSON:

15 Q. And am I correct that this agreement with Priority
16 actually expires six months after the Blue Cross
17 contract expires, correct?

18 A. I would have to look at that.

19 Q. Sure. So if you look at the Blue Cross contract,
20 Exhibit 4 --

21 A. June 30, '14. December 31st, '14, yes.

22 Q. Right. So am I correct in understanding, sir, that

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1 because the Priority contract was both entered into in
2 advance of the Blue Cross contract and not affected by
3 the most favored pricing provision as a result and it
4 also expires after the Blue Cross contract with the
5 most favored pricing provision, that this Priority
6 agreement is not affected in any way by the Blue Cross
7 pricing provision?

8 A. Correct.

9 MR. GRINGER: Object to form.

10 MR. TANGREN: Objection.

11 BY MR. STENERSON:

12 Q. And am I correct that to the extent there were any
13 increases in Priority's rates that were sought by you
14 in negotiating this contract, Government Exhibit 9,
15 that none of those increases to Priority were in any
16 way related or caused by the Blue Cross most favored
17 pricing provision?

18 MR. GRINGER: Objection to form,
19 foundation, misstates the record.

20 MR. TANGREN: Objection.

21 BY MR. STENERSON:

22 Q. I'm sorry, was my statement correct?

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1 A. Correct.

2 Q. So just so we're clear, it's your testimony, sir, that
3 -- withdrawn.

4 Let me ask it this way. In your
5 negotiations with Priority in December of -- November
6 and December of 2009, were those negotiations part of
7 Alpena's expense and revenue project?

8 A. Yes.

9 Q. And am I correct that any increases Alpena sought from
10 Priority at the time in its reimbursement rates were
11 solely related to Alpena's revenue and cost program?

12 A. Yes.

13 Q. And am I also correct that any rate increases that
14 Alpena sought from Priority in November and December
15 of 2009 were not in any way related to the most
16 favored pricing provision of Blue Cross?

17 MR. GRINGER: Object to form, foundation.

18 A. Correct.

19 BY MR. STENERSON:

20 Q. In fact, sir, if you could turn to Page 1, 2, 3, 4 of
21 Exhibit 9, the Priority contract, which is actually on
22 the contract Page 5 of 18 --

KARMON BJELLA

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1 MR. IWREY: The one 1483 Bates Number?

2 MR. STENERSON: I have Alpena DOJ 5,
3 although -- oh, I'm sorry -- yes.

4 MR. IWREY: Okay.

5 MR. STENERSON: No, no. It would be 1484.

6 MR. IWREY: Okay. We are there.

7 BY MR. STENERSON:

8 Q. Sir, are you with me on the Priority contract
9 effective January 1, 2010, Government Exhibit 9,
10 Paragraph 3 above billing provisions; do you see that?

11 A. Yes.

12 Q. It says: If Priority Health determines that that
13 facility has obtained a reimbursement rate from a
14 dominant commercial payer in facility's primary market
15 that in the aggregate is lower than the reimbursement
16 rate paid to the facility by Priority Health, then
17 upon written request from Priority Health, facility
18 agrees to provide financial data to Priority Health as
19 long as the disclosure does not violate any
20 confidentiality agreements with other payers, which
21 disclosure shall be sufficient to validate such
22 reimbursement rate paid by Priority Health to facility

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1 is not greater than the reimbursement rate paid to the
2 facility by the most dominant commercial payer in
3 facility's primary market.

4 Did I read that correctly?

5 A. Yes.

6 Q. Is the dominant commercial payer referred to in that
7 paragraph Blue Cross Blue Shield of Michigan?

8 A. That would be my interpretation.

9 Q. Okay. And is it your understanding from your
10 discussions with Priority that that was their
11 interpretation as well?

12 A. I don't remember any specific names being used, but I
13 can't see how it could mean anything else.

14 Q. Sir, so am I correct that in the contract, Exhibit 9,
15 effective January 1, 2010, Alpena General agreed to
16 provide Priority a most favored nations provision to
17 have their rate equal to Blue Cross Blue Shield
18 Michigan?

19 MR. IWREY: Objection to form.

20 MR. GRINGER: Same objection.

21 A. My reading of this and my recollection was it was
22 focused on two things, the sharing of information,

KARMON BJELLA

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1 number one, and if a confidentiality requirement would
2 not stop us. Guessing at my lack of concern over
3 this, I think we thought the statement was probably
4 soft enough that there wouldn't be an issue, but it
5 was -- it is intended to be much the same, just a
6 little softer, I guess, is -- as we looked at it,
7 again, this was the only one I did, and I don't do
8 this normally. It was considered to be a small
9 contract, a quick effort, and frankly, probably not a
10 lot of attention was focused on it.

11 BY MR. STENERSON:

12 Q. So am I reading it correctly that this clause is
13 intended to be a most favored nations type clause in
14 favor of Priority?

15 MR. GRINGER: Object to form, foundation.

16 MR. IWREY: Same objection.

17 A. Yes.

18 BY MR. STENERSON:

19 Q. How do you interpret this clause, sir, just because of
20 the objections?

21 A. Yeah. I interpret it as an effort by -- and this is
22 where the comment was made to me that this kind of

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1 thing is alive and well in Michigan, everyone does it,
2 it can work for or against you, depending on how it's
3 worded, the timing, all the other things, and this was
4 in probably the original proposal to us, and given
5 that it was fairly soft and somewhat unenforceable
6 maybe, I don't know, we really ignored it, but it is
7 that. It's an attempt to not let the market get away
8 from anybody to the point where they can't sell their
9 insurance, so...

10 Q. And it was something that Priority sought from you?

11 A. Yes.

12 Q. And that you agreed to provide?

13 A. Yes.

14 Q. Were you concerned -- do you recall being concerned at
15 all about Priority because of the rate they were
16 receiving in this contract subcontracting out their
17 contract to others?

18 A. Even now I hadn't thought of that.

19 MR. STENERSON: Let's take a short break.

20 I think I'm almost done.

21 MR. IWREY: Okay.

22 VIDEO TECHNICIAN: The time is now 3:56

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1 p.m. We are off the record.

2 (Recess taken at 3:56 p.m.)

3 (Back on the record at 4:06 p.m.)

4 VIDEO TECHNICIAN: We are back on the
5 record. The time is 4:06 p.m.

6 BY MR. STENERSON:

7 Q. Mr. Bjella, a little earlier we spoke about whether or
8 not the most favored pricing provision in Blue Cross'
9 contract with Alpena caused the possibility to raise
10 any other commercial payer's rate, and your testimony
11 was no; is that right?

12 A. Correct.

13 Q. Slightly different question. Did the Blue Cross most
14 favored pricing provision in the January 1, 2010
15 contract ever prevent Aetna from entering into a new
16 contract with any commercial payer?

17 MR. GRINGER: Object to form.

18 BY MR. STENERSON:

19 Q. Let me rephrase. Did the Blue Cross most favored
20 pricing provision in the January 1, 2010 Alpena Blue
21 Cross contract prevent Alpena from entering into any
22 new contract with any commercial payers after

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1 January 1, 2010?

2 A. No.

3 MR. GRINGER: Objection, asked and
4 answered.

5 BY MR. STENERSON:

6 Q. Also earlier, sir, in response to a hypothetical
7 question from Mr. Gringer, he asked you whether or not
8 Alpena could survive a 10% -- or strike that -- he
9 asked you -- withdraw the question.

10 Sir, do you remember earlier when
11 Mr. Gringer asked you what effect a 10% decrease in
12 Blue Cross' reimbursement rate would have on the
13 hospital?

14 A. Yes.

15 Q. And I believe your testimony was something to the
16 effect that the hospital would survive; do you recall
17 that?

18 A. Yes.

19 Q. Even though the hospital might survive, how might a
20 10% decrease from Blue Cross in its reimbursement
21 rates negatively affect Alpena?

22 MR. GRINGER: Object to form.

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1 A. We would have to find a way to make up for it, which
2 has been the game everyone is playing all the time
3 anyway, and at that time, of course, it would be
4 especially difficult.

5 BY MR. STENERSON:

6 Q. And if you had -- if you tried to make up for a 10%
7 decrease in Blue Cross' rate on the revenue side,
8 where would you go?

9 A. I doubt we could do it on the revenue side. It would
10 probably be more on the expense side. We had -- I
11 think at the time we had gotten concessions from all
12 of our unions once, and we were on the way in for the
13 second time.

14 Q. Sir --

15 A. It would have been -- probably the only place would
16 have been on the expense side.

17 Q. Sir, do you understand the government's theory in this
18 case to be that the -- strike that.

19 On the expense side, would that be, include
20 cutting services to patients?

21 A. It could.

22 Q. Do you understand the government's theory in this case

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1 A. The easy answer is yes and probably in many ways that
2 could be argued. In my opinion, it's a little like
3 the certificate of need laws. We're at a size that
4 requires a certain volume to provide the services we
5 provide, and so added competition actually works
6 against us, I think, in most respects.

7 To have only one private insurer would
8 probably give that insurer an advantage in negotiating
9 with us, except that in our case, we're so far away
10 from everything and we're small enough that I guess we
11 feel we kind of have the upper hand, but that would
12 take a real negotiation at that aggressive level to
13 decide who is right and wrong I think.

14 Q. Has an employer in Alpena or Alcona County ever come
15 to you and asked what the hospital could do to
16 increase health insurance competition?

17 A. Not in my time.

18 Q. In your view is that something that the employers of
19 Alpena and Alcona County value, choices and
20 competition between health insurers?

21 A. Yes, as it relates to their cost of health insurance.

22 Q. And what's the relationship in your understanding

KARMON BJELLA

United States of America v. Blue Cross Blue Shield of Michigan

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1 between competition between health insurers and the
2 cost of health insurance?

3 MR. STENERSON: Object to the form.

4 A. Blue Cross is clearly the gorilla on the block.

5 BY MR. GRINGER:

6 Q. And?

7 MR. STENERSON: Object to the form.

8 BY MR. GRINGER:

9 Q. How does that impact commercial health insurance
10 pricing?

11 MR. STENERSON: Object to the form.

12 A. I guess I would have to think about what it means as
13 an employer when we go buy health insurance, and the
14 hospital has been with Blue Cross for quite some time
15 but has looked at other options out there.

16 BY MR. GRINGER:

17 Q. Alpena is no longer losing money; is that correct?

18 A. Correct.

19 Q. And you testified earlier that when Alpena was losing
20 money, you didn't want to offer any commercial health
21 insurers a discount, correct?

22 A. No. It was better than that. We wanted to go to

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1 every revenue and expense source and improve our
2 position. So not offering any discount, I think
3 that's the game we're in, so we have to offer
4 discounts to everyone. We just wanted to offer -- we
5 just wanted to experience less of a discount.

6 Q. Now -- and we discussed earlier that you do, the
7 hospital does make a significant margin on commercial
8 insurers, correct?

9 A. Correct.

10 Q. Now that the hospital is no longer losing money, would
11 you be more willing to grant a deeper discount in
12 return for additional volume coming to the hospital?

13 A. No.

14 Q. Why not?

15 A. Our capital budget should be about \$7M a year, and
16 it's been 2 to 4 for the past years I've been there.
17 We've got a lot of catching up to do. Worrying about
18 or playing the game in the eyes of the insurer is not
19 something we're capable of doing. We've got all we
20 can do to promote our cost.

21 Q. If a health insurer came to you and said, If you would
22 let us pay 82% of charges and we'll bring you new

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1 business, would that be attractive to you?

2 MR. STENERSON: Object to the form.

3 A. New business, sure.

4 BY MR. GRINGER:

5 Q. Why would that be attractive?

6 A. New business almost at any price. Volume is
7 incredibly important to hospitals of our size. So new
8 business means a lot. It's kind of why hospitals
9 always do business with Medicare. It's such a big
10 volume that almost, almost regardless of the price,
11 you've got to be in that game.

12 Q. Mr. Stenerson was asking you earlier about the impact
13 of your -- scratch that. Let me ask one more question
14 on the topic I was just discussing.

15 Would you be willing to accept payment of
16 82% charges from a new health insurer if that new
17 health insurer offered innovation that would lower
18 hospital cost?

19 MR. STENERSON: Object to the form.

20 A. If the lowering of costs was a better financial
21 position for the hospital than the discount, yes.

22 BY MR. GRINGER:

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1 Q. Do you remember Mr. Stenerson was asking you about how
2 what you ultimately received in increased
3 reimbursement to Blue Cross compared to what you were
4 seeking?

5 A. Yes.

6 Q. And Mr. Stenerson suggested that your outpatient rate
7 that you ultimately received was not what you were
8 seeking; do you recall that?

9 A. Yes.

10 Q. Do you also recall that you had initially written to
11 Blue Cross in Exhibit 2, Government Exhibit 2, that
12 you were not seeking any inpatient increase at all?

13 A. No.

14 Q. Should we take a look at that just to refresh your
15 recollection?

16 A. Yeah.

17 Q. Exhibit 2 being the December 2nd, 2009 letter from
18 Mr. Darland -- to Mr. Darland from Mr. Bjella and
19 Mr. Lanciotti. If you look on the second page of that
20 document, last sentence of the first full paragraph,
21 it states: Inpatient rates will be maintained at
22 current levels.

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1 Do you see that?

2 A. Yep.

3 Q. And ultimately didn't Alpena Regional receive
4 increases in inpatient reimbursement from Blue Cross
5 Blue Shield of Michigan?

6 A. Yeah, I thought so.

7 Q. And indeed if you want to take a look at Government
8 Exhibit 4, which is the contract between Blue Cross
9 Blue Shield of Michigan --

10 A. Yes.

11 Q. -- and Alpena, it references increases in the
12 inpatient reimbursement to the hospital from Blue
13 Cross Blue Shield of Michigan?

14 A. Yes.

15 Q. And therefore, is it possible, Mr. Bjella, that the
16 inpatient reimbursement that the hospital received
17 from Blue Cross Blue Shield of Michigan more than made
18 up for any shortfall in the outpatient reimbursement
19 you were seeking?

20 MR. STENERSON: Object to the form.

21 A. Very well could be. I mean, that's what I assume to
22 be the back and forth, and as I understood it from Ron

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1 Rybar, that was kind of the funny thing that happened
2 in the ten-year contract, is there were two products
3 being paid for, a traditional indemnity product and a
4 PPO, and the business was being shifted from indemnity
5 to PPO, and I may have this backwards, and the one
6 that was being paid well was being shifted away from
7 and the one that was being paid poorly was being
8 shifted into. So it wouldn't surprise me at all if
9 that isn't what the initial letter says we're not too
10 worried about inpatient and by the time they were done
11 negotiating, they said maybe we should be and it took
12 a different direction, but I mean, our position was we
13 had to do better overall.

14 BY MR. GRINGER:

15 Q. In total dollars, how does the increase in
16 reimbursement the hospital received from Blue Cross
17 Blue Shield of Michigan compare to what the hospital
18 was seeking in the first instance?

19 A. Boy, I couldn't say. We felt good about the end
20 result. Whether we started real high making it part
21 of the strategy and accepting something not very close
22 to that original position or whether as fast as the

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1 negotiations happened, I don't think there was a lot
2 of game playing. My guess is our initial position was
3 pretty close to where we ended up.

4 MR. GRINGER: Why don't we go off the
5 record just for a minute. Bear with us.

6 VIDEO TECHNICIAN: The time is now
7 4:43 p.m. We are off the record.

8 (Off the record at 4:43 p.m.)

9 (Back on the record at 4:44 p.m.)

10 VIDEO TECHNICIAN: We are back on the
11 record. The time is 4:44 p.m.

12 MR. GRINGER: I have no further questions
13 right now.

14 MR. STENERSON: Just a handful.

15 MR. IWREY: I have no questions, either.

16 RE-EXAMINATION

17 BY MR. STENERSON:

18 Q. Mr. Bjella, do you think there's anything
19 inappropriate about your best customer seeking to get
20 the best price from the hospital?

21 MR. GRINGER: Objection, form, foundation,
22 misstates the record, prior testimony, any fact in

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1 evidence.

2 BY MR. STENERSON:

3 Q. You can answer, sir.

4 A. We look at volume whether we're buying or selling, and
5 so it's kind of a way of life for us. If you bring us
6 volume, you've got more clout and the negotiations are
7 different, and I think as I said earlier, if an
8 insurer comes to town with no volume and wants to do
9 something, we aren't -- it just isn't a good use of
10 our time. So those are the two extremes. So, yes,
11 volume -- volume has an impact and is important to us.

12 Q. And with regard to non-government payers, Blue Cross
13 Blue Shield of Michigan's volume at Alpena is many
14 multiples more than any other non-government payer; is
15 that correct?

16 A. Correct.

17 Q. And that volume is a primary factor in helping Blue
18 Cross negotiate the best price with Alpena; is that
19 correct?

20 MR. GRINGER: Objection, misstates the
21 record.

22 A. I would say that's true, yes.

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1 BY MR. STENERSON:

2 Q. And, in fact, going to some of your testimony that you
3 just talked about with Mr. Gringer about how Alpena
4 with regard to inpatient services is quite some
5 distance from other hospitals allows you to use that
6 leverage in negotiations with insurers, correct?

7 A. True.

8 Q. And so hypothetically, sir, if Blue Cross' volume
9 wasn't as high as it was and instead of having the mix
10 that you currently have of Blue Cross, Aetna, and
11 Priority, if you, in fact, had three insurers of equal
12 size that Alpena was negotiating with, with everything
13 else equal, do you feel that you'd be able to get even
14 higher rates from those insurers?

15 MR. GRINGER: Objection, foundation.

16 A. It's possible. Again, the distance is such that it's
17 a pretty big lever for us, but if the other insurers
18 were of equal size, that would just add one more way
19 to argue it, I suppose.

20 BY MR. STENERSON:

21 Q. But you would always try to play one against the
22 other, correct?

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1 MR. GRINGER: Objection, form.

2 A. Certainly there's a piece of playing one against the
3 other, but I would -- I would say that a bigger -- a
4 more important strategy is looking at what's currently
5 there and improving on it. I'm not sure that's an
6 important distinction, but the question was asked
7 earlier why didn't you ask for more or something like
8 that, and I guess everything's relative.

9 BY MR. STENERSON:

10 Q. With regard to that, sir, we've had a lot of
11 discussion today about what the rates were in '08 and
12 '09 compared to what they were in '10. I want to ask
13 you a slightly different question, and that is, given
14 our discussion here today about the hospital's revenue
15 and cost program, is it your opinion that even if the
16 Blue Cross contract in 2010 did not contain any most
17 favored pricing provision at all, that Alpena General
18 would have sought and received the same or more rate
19 increases from Blue Cross and Priority?

20 MR. GRINGER: Object to form.

21 A. We clearly would have gone after it. I think both
22 organizations would have given it.

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1 MR. STENERSON: No further questions.

2 Thank you for your time, sir.

3 MR. GRINGER: Just one more question while
4 we're here.

5 RE-EXAMINATION

6 BY MR. GRINGER:

7 Q. Mr. Bjella, is it possible in your view that you would
8 not have gotten the increased reimbursement from
9 Priority Health without the most favored pricing
10 clause from Blue Cross Blue Shield of Michigan?

11 MR. STENERSON: Object to the form.

12 A. Well, certainly anything is possible. I really feel
13 confident that both insurance companies understood our
14 position and made an independent effort to help us.

15 MR. GRINGER: Nothing further. Thank you.

16 MR. IWREY: Nothing for me. Thank you.

17 VIDEO TECHNICIAN: This concludes today's
18 deposition. The time is 4:50, p.m. We are off the
19 record.

20 (Deposition concluded at 4:50 p.m.

21 Signature of the witness was requested.)

22

EXHIBIT 7

HIGHLY CONFIDENTIAL: Smith, Robert 11-14-2012

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

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-----:
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
-----:

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

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

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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.

HIGHLY CONFIDENTIAL: Smith, Robert 11-14-2012

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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

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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

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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

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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

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

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-----:
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

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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

16:22:26

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 9

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

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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

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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

Tuesday, August 14, 2012

Highly Confidential Video Deposition of:

PATRICK McGUIRE,

was called for oral examination by counsel for Plaintiff, pursuant to Notice, at Brooks Wilkins Sharkey & Turco, PLC, 401 South Old Woodward Avenue, Birmingham, Michigan, before Michele E. French, RMR, CRR, of Capital Reporting Company, a Notary Public in and for the State of Michigan, beginning at 9:12 a.m., when were present on behalf of the respective parties:

1 the most favored nations provision?

2 A I can only speak to St. John Providence. We **14:28:48**
3 do not coordinate any other contracts on a statewide
4 basis other than Blue Cross. But for St. John
5 Providence specifically, we have -- we have not made any
6 changes to any contracts because of the MFN.

7 Q And when you -- thank you for that. But when **14:29:11**
8 you say "St. John's Providence," does that include all
9 the facilities in Detroit?

10 A Yes.

11 Q Okay. So I just want to be clear. When we're
12 talking about St. John's Providence, you're talking **14:29:20**
13 about the Providence Hospital and Medical Center in
14 Southfield; correct?

15 A Providence Hospital in Southfield, Providence
16 Novi, St. John Hospital, St. John Macomb, St. John
17 Oakland, St. John River District. **14:29:32**

18 Q Okay. So I'd like to ask a series of
19 questions about the St. John Hospitals --

20 A Okay.

21 Q -- using that definition; okay? Has St.
22 John's hospitals raised the rate of Aetna because of the **14:29:44**
23 Blue Cross MFN?

24 A We have not.

25 Q Has St. John Hospitals raised the rate of

1 United because of the Blue Cross MFN?

2 A We have not. **14:29:54**

3 Q Has St. John's raised the rate of HAP because
4 of the Blue Cross MFN?

5 A We have not.

6 Q Has St. John Hospitals raised the rate of
7 HealthPlus because of the Blue Cross MFN? **14:30:04**

8 A We have not.

9 Q Has St. John's Hospital raised the rate of any
10 payer because of the Blue Cross MFN?

11 A No.

12 Q Has any single payer paid a penny more to St.
13 John's Hospital because of the Blue Cross MFN? **14:30:12**

14 A No.

15 Q Has St. John's Hospital refused to lower any
16 payer's rate because of the Blue Cross MFN?

17 MS. LEWIS: Object to the form. **14:30:28**

18 THE WITNESS: No.

19 BY MR. STENERSON:

20 Q Has Blue Cross [sic] refused to lower Aetna's
21 rate because of the Blue Cross's MFN?

22 MS. LEWIS: Object to the form. **14:30:36**

23 THE WITNESS: I'm sorry?

24 BY MR. STENERSON:

25 Q I'm sorry. Has St. John's refused to lower

1 Aetna's rate because of the Blue Cross MFN?

2 A No. **14:30:44**

3 MS. LEWIS: Again, object to the form.

4 BY MR. STENERSON:

5 Q Has St. John's refused to lower United's rate
6 because of the Blue Cross MFN?

7 A No. **14:30:51**

8 Q Has St. John's refused to --

9 MR. KOENIG: Object to form.

10 BY MR. STENERSON:

11 Q Has St. John's refused to lower Priority's
12 rate because of the Blue Cross MFN? **14:30:59**

13 A No.

14 Q Has St. John's raised Priority's rate because
15 of the Blue Cross MFN?

16 A No.

17 Q Has St. John's refused to lower any payer's **14:31:06**
18 rate because of the Blue Cross MFN?

19 A No.

20 Q Has St. John's refused to enter into a new
21 contract because of the Blue Cross MFN, with any payer?

22 MR. KOENIG: Object to form. **14:31:22**

23 THE WITNESS: No.

24 BY MR. STENERSON:

25 Q Has Blue Cross refused to enter into --

1 MR. DEMITRACK: Oh.

2 BY MR. STENERSON: 14:31:28

3 Q Sorry, strike that.

4 Has St. John's refused to enter into a
5 contract with Humana because of the Blue Cross MFN?

6 MR. KOENIG: Object to form.

7 THE WITNESS: No. 14:31:37

8 BY MR. STENERSON:

9 Q Has St. John's terminated any payer contract
10 because of the Blue Cross MFN?

11 A No.

12 Q Has a patient receiving services at St. 14:31:44

13 John's, from the effective date of the MFN until today,
14 paid a penny more to St. John's for hospital services
15 because of the Blue Cross MFN?

16 MR. KOENIG: Objection to form and

17 foundation. 14:32:02

18 THE WITNESS: Yeah, I think that would be
19 speculative. I don't know that I have enough facts to
20 answer that question.

21 BY MR. STENERSON:

22 O All right. Let me ask you to look at 14:32:21

23 Plaintiff's McGuire Number 4.

24 Now, Plaintiff's McGuire Number 4 refers
25 to negotiations that occurred in or around 2005; is that

1 correct?

2 A Correct. **14:32:45**

3 Q Am I correct in understanding that Blue
4 Cross -- strike that.

5 Am I correct in understanding that
6 Plaintiff's McGuire Number 4 has nothing to do with the
7 negotiations of the 2008 contract? **14:32:54**

8 A That is --

9 MR. KOENIG: Object to foundation.

10 THE WITNESS: That is correct.

11 BY MR. STENERSON:

12 Q And I'd like to have you look at the second **14:33:02**
13 page of Plaintiff's McGuire Number 4. There was some
14 discussion about the bottom of the page. Do you recall
15 that?

16 A I do.

17 Q And is my understanding correct that the **14:33:14**
18 concept of refraining from entering into any new
19 strategic partnerships was only a discussion that
20 occurred internally to Ascension?

21 MR. KOENIG: Objection, form.

22 THE WITNESS: I believe so. I don't **14:33:29**
23 recall ever having this conversation with Blue Cross.

24 BY MR. STENERSON:

25 Q You have no memory of St. John's actually

1 Q Who?

2 A We have -- well, HealthPlus of Michigan. I **15:13:51**
3 believe we did not have a HealthPlus contract
4 previously, and they came to us wanting a contract. I
5 believe we did sign a contract with HealthPlus.

6 Meridian, which is maybe outside of the
7 scope of this because it's a Medicaid HMO, they came to **15:14:17**
8 us. They used to be called Health Plan of Michigan.
9 And some of our facilities were not under contract with
10 the Health Plan of Michigan, and they wanted us to enter
11 into a contract with them for all of our facilities, and
12 we did. We did also enter in that contract. So there **15:14:38**
13 have been a couple.

14 Q Do you recall what rate you ultimately --
15 strike that.

16 Were you personally involved with the
17 HealthPlus negotiations? **15:14:49**

18 A No.

19 Q Who was?

20 A I think it was the same, Al Tucker and
21 Margaret Endres.

22 MR. KOENIG: Can I just go back and ask **15:15:17**
23 you to clarify -- and I guess this would be an objection
24 to form -- what did you mean by a brand-new
25 reimbursement contract? I....

1 MR. STENERSON: I'll clarify.

2 BY MR. STENERSON: 15:15:29

3 Q Since July of 2008, has St. John's contracted
4 with any payer that prior to July of 2008 it had not
5 previously contracted with?

6 A That would -- that would be true for McLaren
7 and for HealthPlus. I included Meridian or Health Plan
8 of Michigan in there. We did have a contract with them.
9 We expanded it to include other facilities. 15:15:48

10 Q Since July of 2008, has St. John's terminated
11 any reimbursement contract that existed with any payer
12 prior to July of 2008? 15:16:05

13 A No. No insurers other than Medicaid
14 providers. We may have terminated a Medicaid contract,
15 but no commercial contracts.

16 MR. STENERSON: Does that clarify,
17 Counsel? 15:16:33

18 MR. KOENIG: Yes, thanks.

19 BY MR. STENERSON:

20 Q So let me have you look at what's been
21 previously marked as Plaintiff's McGuire Number 8.

22 A (Reviewing Plaintiff's McGuire Exhibit 8.) 15:16:55

23 Q Do you recall the testimony you were
24 discussing with Plaintiff's counsel earlier about a
25 possible agreement with Humana?

1 A Yes.

2 Q Did St. John's in or around September of 2009 **15:17:32**
3 ultimately reach a final agreement with Humana?

4 A I -- I don't believe we did.

5 Q And do you have an understanding as to why in
6 or around September of '09 St. John's was not able to
7 reach a final agreement with Humana? **15:17:53**

8 MR. KOENIG: Object to the form.

9 THE WITNESS: Two -- two reasons. One is
10 that we didn't believe that their ability to move
11 incremental business to us was credible; and, secondly,
12 that the rate that they were offering from a business **15:18:18**
13 perspective was unacceptable.

14 BY MR. STENERSON:

15 Q Did the Blue Cross most favored nations
16 provision in the 2008 contract with St. John's in any
17 way prevent you from reaching a final agreement with **15:18:34**
18 Humana in or around September of 2009?

19 A No.

20 Q The first page of paragraph [sic] 8, the
21 e-mail from Miss Denise to Mr. Pendleton, do you see
22 that? **15:18:51**

23 A Yes.

24 Q Do you see where Humana is -- well, strike
25 that.

1 do not believe the Humana offer to be a violation of the
2 Blue Cross contract; correct? **15:22:55**

3 A Correct.

4 Q So what would you say to somebody who would
5 argue to the court in the trial of this matter that your
6 change of -- strike that -- that your testimony that you
7 don't believe it was a violation of the contract is **15:23:08**
8 actually different than what you believed in September
9 of 2009?

10 MS. LEWIS: Object to the form.

11 THE WITNESS: I would -- I would say that
12 you have to look at this e-mail in the context that it **15:23:21**
13 exists. And that is, I am sending an e-mail to my boss,
14 and I am essentially telling her to kind of butt out of
15 these negotiations. And I wanted to be as strong as I
16 could that there are -- there are issues that she may
17 not be aware of. **15:23:51**

18 And the violation of the Blue Cross
19 contract I knew would get her attention. Whether it was
20 really a violation or not, I -- I stand by my testimony.
21 I didn't believe it was then, I don't believe it is now.
22 But I was trying to get a point across to my CEO in **15:24:07**
23 fairly strong -- strong terms.

24 BY MR. STENERSON:

25 Q And do you know if at the time, in September

1 of 2009, whether or not anybody from St. John's told

2 Humana that the Blue Cross MFN was an issue?

15:24:22

3 A They -- it appears that they did, because the
4 e-mail is from Phil Pendleton to Bill Beverwyk and that.

5 I mean, they are discussing the -- the MFN in there, so

6 I assume that Phil did have some conversations. Whether

7 he believed -- you know, Bill -- Phil was not a party to **15:24:52**

8 the Blue Cross negotiations. I don't know that Bill --

9 Phil, sorry, ever saw the contract, but Phil is a

10 negotiator, and he may have been leveraging that we

11 can't do something to Humana, whether he knew we could

12 do it or not.

15:25:19

13 Q And who versus you versus Mr. Pendleton has

14 the final contracting authority on behalf of St. John's?

15 A I do.

16 Q And so am I correct that if somebody at Humana

17 currently holds the belief that the reason they could **15:25:38**

18 not get an agreement with St. John's for the narrow

19 network that's being described in Plaintiff's Exhibit

20 McGuire 8 and 9 was in part due to the Blue Cross MFN,

21 they would be mistaken?

22 MS. LEWIS: Object to the form.

15:25:54

23 THE WITNESS: If -- if their belief was

24 that the MFN was the reason that we couldn't agree to

25 Blue Cross minus 6, they would be mistaken.

1 BY MR. STENERSON:

2 Q And you, sir, have the final authority to make **15:26:09**
3 that decision?

4 A Yes.

5 Q Let's go to Plaintiffs' McGuire Number 7, the
6 Blue Cross contract. I'd like to ask you about the
7 first sentence of paragraph XII. And it states, "AH **15:26:48**
8 attests, on a hospital-specific basis, its 2008 fiscal
9 year payment rates for covered hospital services under
10 its PHA, TRUST Hospital Agreement, and BCN-HAA are, in
11 aggregate, at least 10 percent less than the next best
12 payment rates it has established with any other **15:27:17**
13 commercial insurer for products of similar scope and
14 design." Did I read that correctly?

15 A You did.

16 Q What does that statement, made in or around
17 October of 2008, tell Blue Cross about its relative **15:27:36**
18 discounts at St. John's?

19 A Well, it tells them that in fiscal 2008, which
20 was the last year of the previous contract, which didn't
21 include an MFN, was that the Blue Cross rates were 10
22 percent, at least 10 percent lower than the next best **15:28:02**
23 payment rate.

24 Q In fact, it suggests that -- well, strike
25 that.

1 A We have. We are negotiating. We have an
2 agreement that expires at the end of this calendar year **15:45:08**
3 that we are in the process of negotiating.

4 Q And which of those recent HAP agreements would
5 you characterize as risk contracts?

6 A All of them are risk contracts.

7 Q Am I correct in understanding that it's St. **15:45:24**
8 John's view that the most favored nations provision in
9 the Blue Cross contract does not apply to any of the
10 risk contracts it's negotiated with HAP?

11 A That is my view.

12 Q And have you negotiated each and every **15:45:41**
13 agreement, risk contract agreement, with HAP as if the
14 Blue Cross most favored nations provision did not apply
15 to them?

16 A Yes.

17 Q Is it fair to say, then, that for no HAP **15:45:53**
18 contract that you have negotiated since July of 2008 has
19 the reimbursement rate St. John's agreed to been
20 affected by the Blue Cross MFN?

21 A That's correct.

22 MR. STENERSON: At a break, I'd asked **15:46:09**
23 counsel, we can get an agreement off the record to
24 authenticate contracts so we don't have to go one at a
25 time while we're here today?

1 MR. DEMITRACK: I will authenticate any
2 contract that appears to be what it says it is, and I **15:46:20**
3 will do that with any of the parties in this case.

4 MR. STENERSON: Thank you, Counsel.

5 BY MR. STENERSON:

6 Q So, Mr. McGuire, without looking at every
7 contract, though, you would expect the actual **15:46:31**
8 reimbursement rates that St. John's agreed to with HAP
9 to be contained in the final executed agreements;
10 correct?

11 A Yes.

12 Q And for none of those HAP contracts that were **15:46:44**
13 entered into after July of 2008 to the present were any
14 of those rates in the final contracts affected by the
15 Blue Cross MFN?

16 A That's correct.

17 Q Now, we spoke a bit earlier about negotiations **15:46:57**
18 St. John's had with HealthPlus. Do you recall
19 mentioning HealthPlus?

20 A I do.

21 Q When is the last time you, sir, personally
22 negotiated with HealthPlus? **15:47:38**

23 A I have never personally negotiated with
24 HealthPlus.

25 Q It was Mr. Tucker and Miss Endres?

1 A Right, Endres.

2 Q Endres. Let me show you what's been marked as **15:47:53**
3 Blue Cross 271.

4 (Blue Cross Exhibit 271 was marked.)

5 BY MR. STENERSON:

6 Q I hand you what has been marked as Blue Cross
7 271. Please take a minute to review that. **15:48:41**

8 A (Reviewing Blue Cross Exhibit 271.)

9 Q Have you had a chance to look at Blue Cross
10 271?

11 A Hold on. (Reviewing Blue Cross Exhibit 271.)
12 Okay. **15:49:36**

13 Q Does Blue Cross 271 refresh your memory as to
14 the range of reimbursement rates St. John's was
15 discussing with HealthPlus?

16 A Yes.

17 Q And what range of reimbursement rates was St. **15:49:47**
18 John's discussing with HealthPlus in or around October
19 of 2009?

20 A Well, it appears that they're -- they were
21 asking for 50 percent of charges, so a 50 percent
22 discount, and we were saving that that number needed to **15:50:03**
23 get up significantly.

24 Q And, again, why was St. John's seeking an
25 additional reimbursement rate from HealthPlus in or

1 around 2009?

2 A Similar to the conversation we had about 15:50:18
3 McLaren, HealthPlus is a very insignificant plan in
4 terms of membership in our market, so our -- the amount
5 of business that we would get from HealthPlus seemed to
6 be relatively immaterial and would probably be moved
7 from other current insured business. And so given that 15:50:45
8 there wasn't a whole lot of upside for us in this
9 contract, there was no reason to really give them kind
10 of a really good deal.

11 Q And how did the reimbursement rate that you --
12 that St. John's was seeking from HealthPlus compare to 15:51:02
13 the reimbursement rate that Blue Cross had in or around
14 October of 2009?

15 A Oh, it would have been much higher.

16 Q And am I correct in understanding that the
17 rate that St. John's offered to contract with HealthPlus 15:51:14
18 in or around 2009 had nothing to do with the Blue Cross
19 MFN clause?

20 A Right.

21 Q So I am correct?

22 A That's correct. 15:51:24

23 Q Did you ultimately reach agreement, St. John's
24 and HealthPlus, upon a reimbursement contract?

25 A I believe we did.

1 Q Do you believe that contract is currently in
2 place? **15:51:35**

3 A I think so.

4 Q Does St. John's currently have a contract with
5 United Healthcare?

6 A We do.

7 Q Do you know when that agreement was negotiated **15:51:59**
8 and signed?

9 A I don't specifically.

10 (Blue Cross Exhibit 272 was marked.)

11 BY MR. STENERSON:

12 Q Let me show you what's been marked as Blue **15:52:09**
13 Cross Exhibit 272 and ask you to take a moment to review
14 that.

15 A (Reviewing Blue Cross Exhibit 272.) Okay.

16 Q So does Blue Cross 272 -- well, strike that.

17 Were you personally involved with the **15:53:32**
18 discussions with United Healthcare in or around February
19 of 2008?

20 A I might have attended a meeting or two, but
21 primarily Margaret Endres would have handled the
22 negotiations. **15:53:46**

23 Q Were you the final decision-maker as to what
24 rate to agree to for United Healthcare?

25 A Yes.

1 THE WITNESS: I don't -- I don't know. I
2 believe that Blue Cross has an obligation, but I'm not **16:07:58**
3 an expert.

4 BY MR. STENERSON:

5 Q Do you know if anyone else does?

6 A I'm not aware that anyone else does.

7 Q The first portion of the last paragraph **16:08:06**
8 states, "This proposal may not meet Ascension's full
9 expectations...." Do you see that?

10 A Yes.

11 Q Is it fair to say that at the beginning of the
12 2008 negotiating session with Blue Cross that Ascension **16:08:25**
13 sought higher reimbursements than were ultimately agreed
14 upon?

15 A Yes.

16 Q Do you recall how much higher Ascension
17 started with its reimbursement request? **16:08:36**

18 A It was -- I don't know the exact number, but
19 it was significantly higher.

20 Q Was it in the tens of millions of dollars?

21 A Yes.

22 O And that is, Ascension, in the 2008 **16:08:48**
23 negotiating session with Blue Cross, sought tens of
24 millions of dollars in additional reimbursements from
25 Blue Cross as compared to what it actually agreed upon

1 in the end?

2 A That's correct. 16:09:05

3 Q Do you know how far Blue Cross came up from
4 its original offer?

5 A Not -- not specifically, but I would say that
6 we did not meet in the middle. It was much closer to
7 the Blue Cross position than it was to our original 16:09:20
8 starting point.

9 Q I'm not sure -- I apologize. I'm not sure if
10 I asked this question with regard to United. The
11 ultimate agreement that was reached with United, am I
12 correct in understanding that the reimbursement rate 16:09:55
13 from United to St. John's in the final agreement was not
14 affected in any way by the Blue Cross MFN?

15 A That's correct.

16 MR. KOENIG: Objection, foundation.

17 BY MR. STENERSON: 16:10:10

18 Q Does St. John's still have a reimbursement
19 contract with United today?

20 A We do.

21 Q Has -- strike that.

22 What would you say to somebody who said 16:10:23
23 that you should have made United Healthcare more
24 competitive by giving them an even lower reimbursement
25 rate than you ultimately did?

1 A My -- my view is that that would not have been
2 a good business decision for us. We have -- we have not **16:10:39**
3 seen significant evidence that any of the competitors to
4 Blue Cross have ever been successful in significantly
5 moving business away from Blue Cross.

6 So we have no -- we have no evidence that
7 United would be successful. And, in fact, they would be **16:11:07**
8 more likely to take business away from Aetna and
9 Cofinity and Health Alliance Plan and others, where we
10 would lose revenue.

11 Q And following on it, though, what would you
12 say -- well, the reason is, is because you didn't give **16:11:24**
13 them a rate low enough. If you ultimately did, they
14 might -- they might succeed.

15 A Well, a --

16 MS. LEWIS: Objection to form. I'm not
17 sure what the question was there. **16:11:31**

18 THE WITNESS: A company like United and
19 potentially Aetna, certainly United, has -- has
20 generated huge -- huge operating profits and has
21 significant financial resources.

22 And our view has been if they really want **16:11:55**
23 to come into the state and make a concerted effort to
24 gain market share from Blue Cross, then they would be
25 able to do that without requiring hospitals to give them

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1 86672 and tell me what the reimbursement rate is in the
2 Aetna 2003 St. John contract? **16:32:12**

3 A 80 percent of billed charges.

4 Q And that's for what type of services?

5 A For inpatient services.

6 Q And what about -- do you see on the next page,
7 does it have the rate for outpatient services? **16:32:24**

8 A Yes. It's the same rate, 80 percent billed
9 charges.

10 Q And in or around March of 2003, do you know
11 what the Blue Cross rate of reimbursement was at St.
12 John's? **16:32:41**

13 A I believe, within order of magnitude, probably
14 around 40 percent.

15 Q So how did Blue Cross's rate of reimbursement
16 in 2003 compare to Aetna's rate of reimbursement in
17 2003? **16:32:58**

18 A Well, it was about half.

19 Q So Aetna's rate is 100 percent higher in 2003?

20 A Correct.

21 Q And do you know how Aetna's rate today
22 compares to Blue Cross's rate? **16:33:07**

23 A It's higher.

24 Q Do you know how much higher?

25 A It is probably about [REDACTED] higher.

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1 Q And so since 2003, what has happened to the
2 gap between Blue Cross's rate and Aetna's rate? **16:33:25**

3 A The gap has been reduced.

4 Q And how significantly would you describe the
5 gap being reduced?

6 MS. LEWIS: Objection, form.

7 THE WITNESS: I would say very **16:33:35**
8 significantly.

9 BY MR. STENERSON:

10 Q And the 80 percent rate that Aetna had in
11 2003, did that have anything to do with an MFN clause
12 that Blue Cross had with St. John's? **16:33:42**

13 A No.

14 Q And the amount of reductions that Aetna has
15 received through various negotiations with St. John's
16 from 2003 to the present, has the amount of the
17 reduction been limited in any way by the Blue Cross MFN? **16:34:02**

18 MS. LEWIS: Object to the form.

19 THE WITNESS: No.

20 BY MR. STENERSON:

21 Q So do you recall a conversation -- or, strike
22 that. **16:34:26**

23 Do you know who Mike Andreshak is?

24 A I do.

25 Q Who is Mr. Andreshak?

1 A He, for the majority of time that I have
2 known, known him, he has been -- I don't know the exact **16:34:37**
3 title, but Vice President of Contracting for Aetna. He
4 is currently a Vice President at Blue Cross.

5 Q Do you recall in or around 2009 anyone from
6 Aetna approaching St. John's about seeking a new
7 business rate for Aetna business? **16:35:02**

8 A I don't know the exact time frame, but I know
9 that Aetna did approach us about a new business rate.

10 Q And who at Aetna approached St. John's?

11 A I recall Mike Andreshak and one other
12 gentleman. I can't remember his name. **16:35:20**

13 Q Do you recall Aetna telling St. John's that
14 they were working with all the major hospital
15 competitors in the area to achieve reimbursement rates
16 that were at or near parity with the dominant health
17 insurer in Michigan? **16:35:38**

18 MS. LEWIS: Objection to the form.

19 THE WITNESS: I know that they were --
20 they -- I recall near parity, and I do recall them
21 saying that they -- they weren't just talking to us,
22 they were talking to other health systems in the market. **16:35:53**

23 BY MR. STENERSON:

24 Q And what do you recall Aetna explaining to you
25 as to why it would be a good idea -- strike that.

EXHIBIT 10

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

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

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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

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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 11

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

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

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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

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Detroit, Michigan

Tuesday, November 13, 2012

Confidential Video Deposition of:

KENNETH MATZICK,

was called for oral examination by counsel for Plaintiff, pursuant to Notice, at Miller Canfield Paddock and Stone, 150 West Jefferson, Suite 2500, Detroit, Michigan, before Michele E. French, RMR, CRR, of Capital Reporting Company, a Notary Public in and for the State of Michigan, beginning at 9:32 a.m., when were present on behalf of the respective parties:

1 A We're talking about from 2004 forward?

2 Q Sure. 13:28:34

3 A Yes. Years ago they had cost reimbursement,
4 totally different scenario, but....

5 Q And so that time period would include both the
6 2006 renegotiation and 2009 renegotiation?

7 A Yes. 13:28:56

8 Q And, to your knowledge, has Blue Cross ever
9 threatened not to contract with Beaumont if Beaumont
10 didn't agree to a most favored nations provision with
11 Blue Cross?

12 MR. MATHESON: Object to the foundation.13:29:21

13 THE WITNESS: I don't think that was ever
14 a specific point of discussion because the Participating
15 Hospital Agreement that the Hospital Association and its
16 members, as in all hospitals in Michigan, to include
17 Beaumont, agreed to standard language that was in that 13:29:39
18 agreement and standard clauses, such that that was
19 determined in another venue, between the MHA and the
20 representative hospitals negotiating with Blue Cross, so
21 that when that comes to the hospital, you execute that
22 agreement. 13:29:56

23 BY MR. GOURLEY:

24 Q So the MFN had always been there. Any
25 negotiation in terms of increasing reimbursement by Blue

1 Cross was independent of the fact that that MFN was
2 already there and was going to stay there? 13:30:07

3 MR. TORZILLI: Object to the form.

4 THE WITNESS: Yes. PHA dealt with issues
5 like that and the methodology of reimbursement, the
6 formulas to determine payment, as opposed to individual
7 negotiations with the hospitals that would address 13:30:22
8 specific -- issues specific to those hospitals, excuse
9 me.

10 BY MR. GOURLEY:

11 Q During your time at Beaumont, were you ever in
12 a position to know whether or not Beaumont adjusted a 13:31:01
13 non-governmental payer's reimbursement rate in order to
14 comply with a Blue Cross MFN in its contract?

15 MR. TORZILLI: Objection to the
16 foundation.

17 THE WITNESS: I'm not aware of that ever 13:31:16
18 having occurred.

19 BY MR. GOURLEY:

20 Q So you don't think it ever occurred?

21 A No.

22 MR. MATHESON: Object to the form and 13:31:34
23 foundation.

24 And, Jason, we do have an agreement that
25 an objection by one Plaintiff's counsel is an objection

1 for all; correct?

2 MR. GOURLEY: Yes. 13:31:53

3 MR. MATHESON: Thank you.

4 BY MR. GOURLEY:

5 Q You were involved in the late 2005 time frame
6 in renegotiating Blue Cross's reimbursement rates at
7 Beaumont; correct? 13:32:27

8 A Yes, as identified in the previous documents
9 or exhibits.

10 Q Do you remember if the amount of reimbursement
11 that Blue Cross agreed to pay Beaumont in 2006 was less
12 than what Beaumont originally sought from Blue Cross 13:32:53
13 during those negotiations?

14 A I don't remember the specifics.

15 Q But do you remember if --

16 A They usually gave us less than we asked for.

17 Q Right. I mean, in your experience, Blue Cross 13:33:12
18 would give Beaumont less than what they asked for in
19 reimbursement during the negotiations?

20 MR. MATHESON: Objection to foundation.

21 THE WITNESS: Yeah, I'm not sure that's
22 unique to Beaumont, but...that's why you negotiate. 13:33:24

23 BY MR. GOURLEY:

24 Q You don't just get your first offer; right?

25 A Generally.

1 in the deal.

2 Q Right. So Beaumont's interest isn't that a 13:53:44
3 commercial insurer can go out and sell more business;
4 it's making sure you were getting a revenue return on
5 your contracts?

6 A Yes.

7 Q And Beaumont makes a decision as to how much 13:53:56
8 of a discount it's able to offer and still receive
9 enough revenue to achieve its margin?

10 A Yes.

11 Q During your time at Beaumont, did you ever
12 make any business decision on behalf of Beaumont as a 13:54:31
13 result of the Blue Cross MFN with -- in the
14 reimbursement contract?

15 MR. TORZILLI: Object to the form.

16 THE WITNESS: That's a very broad
17 question. Could you narrow that a little bit? 13:54:47

18 BY MR. GOURLEY:

19 Q In your --

20 A Pertaining to what dimension of business?

21 Q I guess I'm trying to understand what impact
22 the MFN in the reimbursement contract with Blue Cross 13:55:07
23 and Beaumont had on your day-to-day responsibilities.

24 A Well, one, it's a contractual obligation,
25 executed a contract with that in it, so we need to honor

1 our contracts by not providing that discount level to --
2 through another contract with another third party. 13:55:40

3 There are many ramifications to your
4 question. To the extent to which it limited our revenue
5 because the discount was substantial, you know, limits
6 what we can do in the way of programs and services for
7 clientele, so.... 13:55:58

8 Q But did you make any decisions where you were
9 thinking in your head I have to make this decision
10 because of a Blue Cross MFN?

11 MR. TORZILLI: Object to form.

12 THE WITNESS: Not that I could 13:56:09
13 specifically point to, no.

14 BY MR. GOURLEY:

15 Q And you weren't aware of the specific most
16 favored nations language that's included in the 2009
17 Letter of Understanding with Beaumont until today; 13:56:25
18 correct?

19 A Correct, yes.

20 You're referring to the one that talks
21 about keeping the spread the same as of whatever the
22 date was? 13:56:40

23 Q I was referring to what we marked as
24 Exhibit -- Plaintiff's Exhibit 8.

25 A Yes. Yes.

1 Q And I think you testified to this already, but
2 is it your belief that while employed at Beaumont, Mark13:57:06
3 Johnson made business decisions that were in Beaumont's
4 best interest?

5 A Yes.

6 Q And in his position while at Beaumont, Mark
7 Johnson handled negotiations with respect to 13:57:40
8 reimbursement contracts with all non-governmental
9 payers; correct?

10 A Yes.

11 Q And is it true that any reimbursement contract
12 he negotiated with any commercial payer had to be 13:57:51
13 approved by someone above him?

14 A No, I think we gave Mark the signature
15 authority on contracting.

16 Q And so was that part of the --

17 A The -- the business implications of the 13:58:10
18 contract relative to how much revenue would flow or
19 other -- I mentioned the contract administration, other
20 obligations, outside audits, those types of things,
21 reviews of clinicals, those might not be his purview,
22 but the basic negotiations and contract. 13:58:30

23 Q And so was signature approval part of the job
24 description for the position that Mark Johnson held?

25 A I don't have the signature approval cards or

1 A Correct.

2 Q -- right? 14:08:05

3 A Correct.

4 Q And even to gain new business, it would not be
5 consistent with your practice as a CEO to violate the
6 contractual commitment Mark Johnson made to Blue Cross
7 to maintain a differential between the rates Blue Cross
8 receives at Beaumont Hospitals and the rates Blue
9 Cross's competitors receive; right? 14:08:17

10 MR. GOURLEY: Objection, foundation.

11 THE WITNESS: Yes.

12 MR. MATHESON: That's all that I have. 14:08:30
13 Thank you very much.

14 MS. NOTEWARE: I have no further
15 questions.

16 RE-EXAMINATION

17 BY MR. GOURLEY: 14:08:39

18 Q I just have a brief couple follow-ups.

19 To your knowledge, did Beaumont ever
20 refuse to give Aetna a lower reimbursement rate
21 specifically to comply with the Blue Cross MFN?

22 MR. MATHESON: Objection to the 14:09:12
23 foundation.

24 THE WITNESS: Refuse to give them a --
25 those are two things tied together there. The first

1 part of that question is, would we consider giving them
2 a lower discount rate? Yes, if they brought more 14:09:24
3 business.

4 Would we violate the Blue Cross favored
5 nations clause? No.

6 BY MR. GOURLEY:

7 Q My question is more specific. I'm asking 14:09:33
8 factually, not hypothetically. I know we've been
9 spending a lot of time in hypotheticals. But I'm saying
10 factually, to your knowledge, did Beaumont at any time
11 refuse to give Aetna a lower reimbursement rate,
12 invoking the Blue Cross MFN as the reason? 14:09:59

13 MR. MATHESON: Objection to foundation.

14 THE WITNESS: No, not to my knowledge.

15 BY MR. GOURLEY:

16 Q To your knowledge, did Beaumont at any time
17 refuse to give any non-governmental payer a lower 14:10:14
18 reimbursement rate by invoking the Blue Cross MFN as the
19 reason?

20 MR. TORZILLI: Object to the form.

21 THE WITNESS: No. Again, not to my
22 knowledge. 14:10:33

23 BY MR. GOURLEY:

24 Q To your knowledge, did Beaumont ever refuse to
25 contract with a commercial insurer who previously did

1 not have a reimbursement contract with Beaumont, as a
2 result of Blue Cross's MFN? 14:10:58

3 A No.

4 MR. GOURLEY: I have nothing further.

5 MR. TORZILLI: No, nothing further from
6 the United States.

7 VIDEOGRAPHER: The deposition is 14:11:22
8 concluded at 2:11.

9 (Deposition concluded at 2:11 p.m.)

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CERTIFICATE OF NOTARY

STATE OF MICHIGAN)

) SS

COUNTY OF INGHAM)

I, MICHELE E. FRENCH, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth; that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party nor interested in the event of this cause.

Dated: November 20, 2012

Michele E. French, CSR-3091, RMR, CRR
Notary Public, Ingham County, Michigan
My Commission expires: December 2, 2017

EXHIBIT 12

HIGHLY CONFIDENTIAL: Vitale, Nickolas 11-12-2012

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

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-----:
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    : Hon. Denise Page Hood
MICHIGAN,                    : Mag. Mona K. Majzoub
          Defendant.         :
-----:

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

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

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Detroit, Michigan

Monday, November 12, 2012

Confidential Video Deposition of:

NICKOLAS VITALE,

was called for oral examination by counsel for Plaintiff, pursuant to Notice, at Miller, Canfield, Paddock and Stone, 150 W. Jefferson, Suite 2500, Detroit, Michigan 48226, before Quentina R. Snowden, CSR-5519, of Capital Reporting Company, a Notary Public in and for the State of Michigan, beginning at 9:30 a.m., when were present on behalf of the respective parties:

1 (Off the record at 11:34 a.m.)

2 VIDEO TECHNICIAN: We're back on the
3 record. The time is 12:38 p.m. This marks the
4 beginning of tape number three.

5 (Back on the record at 12:38 p.m.) 12:39

6 EXAMINATION BY COUNSEL FOR DEFENDANT

7 BY MR. GOURLEY:

8 Q Good afternoon, Mr. Vitale.

9 A Good afternoon.

10 Q I introduced myself before, but my name is 12:40

11 Jason Gourley and I represent Blue Cross/Blue Shield
12 of Michigan in these matters.

13 MR. TORZILLI: Jason, before you get
14 started, let me just note for the record, as we've
15 typically done in depositions in this case, we'd like 12:40
16 that the record to reflect an objection made by one of
17 the Plaintiffs being an objection made in all of the
18 cases.

19 MR. GOURLEY: Agreed.

20 BY MR. GOURLEY: 12:40

21 Q I believe this morning you discussed with Mr.
22 Torzilli and Mr. Matheson the fact that you didn't
23 become aware that Beaumont had a most favored nations
24 clause in its contract with Blue Cross until late
25 2010; is that correct? 12:40

1 A When it was made public in the press is my
2 recollection of when I was made aware of that.

3 Q Okay. And I believe through some
4 conversations with Mr. Matheson we determined that was
5 around the October 2010 time frame? 12:41

6 A Right.

7 Q Okay. So I assume that prior to October of
8 2010, the most favored nations provision in Beaumont's
9 contract with Blue Cross didn't impact any business
10 decision that you made on behalf of Beaumont? 12:41

11 A It did not.

12 Q During that time period prior to October of
13 2010, say from 2006 to October of 2010, you didn't
14 take (sic) any business decision on behalf of Beaumont
15 as a result of the MFN provision in Beaumont's 12:41
16 contract with Blue Cross?

17 A I did not. I would not have been in a
18 position to have an impact on contracting, so --

19 Q Okay.

20 A -- it wasn't relevant. 12:41

21 Q To your knowledge, did Beaumont ever adjust a
22 commercial insurer's reimbursement rate to comply with
23 the most favored nations provision in its contract
24 with Blue Cross/Blue Shield of Michigan?

25 MR. MATHESON: Objection to foundation. 12:42

1 THE WITNESS: To my knowledge, no.

2 BY MR. GOURLEY:

3 Q So, to your knowledge, Beaumont never
4 adjusted Aetna's reimbursement rate in order to comply
5 with the most favored nations provision in its 12:42
6 contract with Blue Cross, correct?

7 MR. MATHESON: Objection, foundation.

8 THE WITNESS: Correct. Correct.

9 BY MR. GOURLEY:

10 Q I believe you testified earlier that you 12:43
11 don't remember specifically bringing up removal of the
12 most favored nations provision when you were
13 negotiating with Blue Cross in the 2011 time frame; is
14 that correct?

15 A No. What I recall is there was a brief 12:43
16 discussion very early on in the negotiations and Blue
17 Cross requested that we table that for now and go
18 through all the business aspects of the discussion and
19 that we would circle back to that at the end of the
20 agreement. 12:43

21 Q Okay. So the most favored nations provision
22 wasn't a sticking point in negotiations during that
23 time period?

24 MR. MATHESON: Object to
25 characterization. 12:43

1 THE WITNESS: No.

2 MR. TORZILLI: Object to foundation.

3 BY MR. GOURLEY:

4 Q Was the focus in 2011 primarily on Beaumont's
5 attempts to maintain more reimbursement from Blue 12:44
6 Cross/Blue Shield of Michigan?

7 A No. Beaumont's attempt was to receive fair
8 reimbursement from Blue Cross.

9 Q And that's -- you're making a distinction
10 between "more" and "fair"; is that correct? 12:44

11 A I am.

12 Q Okay. And in order -- at that point in time,
13 in order to achieve what you perceived as fair
14 reimbursement from Blue Cross, were you seeking more
15 reimbursement from Blue Cross than you had previously 12:44
16 been receiving?

17 A Yes.

18 Q So part of your attempt to achieve a fair
19 rate was to get more money in reimbursement from Blue
20 Cross? 12:44

21 A Correct.

22 Q In your experience at Beaumont, do you
23 believe that Blue Cross typically underpaid Beaumont
24 for -- in terms of its reimbursement rate?

25 A Yes. 12:45

EXHIBIT 13

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.

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September 6, 2012

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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
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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

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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

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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
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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
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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

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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

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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
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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
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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.

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September 6, 2012

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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

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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
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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
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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

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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.

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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.

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1 Q. Who is Martin?

2 A. Martin Skrzyński 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

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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

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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?

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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.

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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

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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?

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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

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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.)

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EXHIBIT 14

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

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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.

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- 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?

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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.

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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

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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

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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

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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:

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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.

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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,

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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:

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- 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?

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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

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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.

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December 13, 2012

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,

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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

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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

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

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

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- 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

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

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

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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-----:
AETNA INC.,                     :
                                :
                                :   Civil Action No.:
                                :
                                :   2:11-cv-15346-DPH-MKM
                                :
                                :
Defendant.                       :
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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 If Marquette were so inclined to give
2 Priority a rate at Marquette General that was 14:07:18
3 competitive with Blue Cross's in or around May of 2010,
4 how would it have done so?

5 MR. GRINGER: Object to form.

6 THE WITNESS: We would have taken a look
7 at the total, as we discussed before, inpatient, 14:07:31
8 outpatient and the physician practices, to see if we
9 could move the adjustments around to make sure it could
10 work for both of us.

11 BY MR. STENERSON:

12 Q And if all other terms were acceptable to 14:07:41
13 Marquette, would it have been willing to do so?

14 A We would have been willing to look at any
15 creative alternative.

16 Q Do you believe the Blue Cross most favored
17 pricing provision prevented Marquette from entering into 14:07:52
18 a competitive agreement with Priority?

19 A No.

20 MR. GRINGER: Object to form and
21 foundation.

22 BY MR. STENERSON: 14:07:59

23 Q And why not?

24 MR. GRINGER: Same objections.

25 THE WITNESS: I had lost interest in

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 16

TIMOTHY SUSTERICH
November 20, 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 _____

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The Confidential Videotaped Deposition of
TIMOTHY SUSTERICH,
Taken at 5900 Byron Center Avenue,
Wyoming, Michigan,
Commencing at 9:17 a.m.,
Tuesday, November 20, 2012,
Before Rebecca L. Russo, CSR-2759, RMR, CRR.

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November 20, 2012

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1 Q. Do you know what the differential was between Blue
2 Cross and the next commercial insurer immediately
3 before the rate in 1059 took effect?

4 A. I don't recall.

5 Q. Do you agree with me that it would have been greater
6 than 3.6?

7 A. The way I interpreted this language, that would have
8 been the aggregate of all commercial payers, and it
9 would have been less, for sure, 3.6 percent less than
10 that.

11 Q. And when you say it would have been less, what do you
12 mean?

13 A. The reimbursement.

14 Q. Right. So Blue Cross' rate, prior to the rate in
15 1059, was a deeper discount for Metro Health than Blue
16 Cross paid after 1059?

17 A. Correct.

18 Q. And, therefore, the discount gap between Blue Cross
19 and other commercial payers at Metro Health would have
20 been greater than it was after the reimbursement being
21 paid by Blue Cross in 1059?

22 A. Yes.

23 MS. BHAT: Objection to form.

24 BY MR. STENERSON:

25 Q. Now, you mentioned you interpreted the most favored

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November 20, 2012

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1 pricing provision as an aggregate number?

2 A. Yes.

3 Q. Can you explain what you mean by that?

4 A. All commercial payers.

5 Q. So I just want to make sure I'm getting this right.

6 When you say in the aggregate approximately 3.6 less

7 than the next best payment rates it has established

8 with any other commercial insurer, you interpreted the

9 3.6 percent to be a combination of all

10 non-governmental payers other than Blue Cross?

11 A. Correct.

12 Q. Has Metro Health changed the reimbursement rate of any

13 commercial payer because of the terms in the most

14 favored pricing provision that is contained in Blue

15 Cross 1059?

16 A. No.

17 Q. Has Metro Health refused to give any commercial payer

18 a deeper discount than it otherwise would have because

19 of the most favored pricing provision that's contained

20 in Blue Cross 1059?

21 MR. MATHESON: Object to foundation.

22 A. No.

23 BY MR. STENERSON:

24 Q. Has Metro Health changed the rate Priority pays to

25 Metro Health in any way because of the provision,

TIMOTHY SUSTERICH
November 20, 2012

1 provisions that are contained in -- strike that.

2 Has Metro Health changed the rate Priority
3 pays to Metro Health in any way because of the clauses
4 under the most favored pricing provision in Blue Cross
5 1059?

6 A. No.

7 Q. Has Metro Health changed in any way the rates that
8 Aetna pays to Metro Health because of the clauses
9 under the most favored pricing provision in Blue Cross
10 1059?

11 MR. MATHESON: Object to foundation.

12 A. No.

13 BY MR. STENERSON:

14 Q. Has Metro Health changed the reimbursement rate that
15 any other payer has paid to Metro Health because of
16 the most favored pricing provisions contained in Blue
17 Cross 1059?

18 MS. BHAT: Objection to form.

19 A. No.

20 BY MR. STENERSON:

21 Q. I'm going to show you what I'm gonna mark as Blue
22 Cross 1060.

23 MARKED FOR IDENTIFICATION:

24 BLUE CROSS EXHIBIT 1060

25 10:55 a.m.

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1 BY MR. STENERSON:

2 Q. Do you recognize Blue Cross 1060?

3 A. I would say no.

4 Q. Do you recognize the signature on the third page of
5 Blue Cross 1060?

6 A. I do.

7 Q. And whose is it?

8 A. Mine.

9 Q. Do you have any memory of -- well, strike that.

10 You were a CC on the top email of Blue

11 Cross 1060, is that correct?

12 A. I was.

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1 to me, please?

2 MR. STENERSON: Object to the form.

3 MR. ETTINGER: Go ahead. I was waiting for
4 the question, but then one came, so --

5 MR. STENERSON: You beat me to the punch.

6 A. I got lost. So I guess you have your opinion, I have
7 mine, about whether or not it can or cannot affect the
8 differential. It certainly would. But I can't say up
9 or down.

10 BY MR. MATHESON:

11 Q. If Metro Health were to increase the reimbursement
12 rates it demanded from all commercial payers except
13 Blue Cross, would that impact the differential
14 affected by the most favored pricing provision in the
15 LOU?

16 A. If we requested the same level of reimbursement
17 increase from all other commercial payers, it most
18 certainly would.

19 Q. If you granted -- or strike that.

20 If you negotiated with all commercial
21 payers, other than Blue Cross, a decrease in the
22 reimbursement rates they provided to Metro Health,
23 that would also impact the differential that's
24 dictated by the most favored pricing provision in the
25 LOU, right?

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November 20, 2012

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1 MR. STENERSON: Object to the form.

2 A. It certainly would, but I probably wouldn't be the CFO
3 of the organization if I was negotiating decreases.

4 BY MR. MATHESON:

5 Q. But under your watch, customer-specific discounts have
6 been negotiated for certain commercial insurers at
7 Metro Health, right?

8 A. Hmm-hmm.

9 Q. And so building on the two foundational questions,
10 which is if you were to increase everyone's
11 reimbursement rates, it would impact the differential,
12 and if you were to decrease everyone's reimbursement
13 rates, it would also impact the differential. Do I
14 understand that right?

15 A. As long as no membership went to Blue Cross, you would
16 be accurate, yes.

17 Q. So how can it be the case that you would fail to
18 impact the differential that's dictated by the most
19 favored pricing provision in the LOU if you were to
20 decrease the reimbursement rates that all commercial
21 insurers except for Blue Cross and one other person
22 pay Metro Health?

23 MR. STENERSON: Object to the form.

24 A. I'm not following the question, I'm sorry.

25 BY MR. MATHESON:

TIMOTHY SUSTERICH
November 20, 2012

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1 Q. I just don't understand why directionally it's true
2 that if you decrease everyone's reimbursement rates,
3 it impacts the most favored pricing provision, but if
4 you decrease one person's reimbursement rates, you
5 think it would not impact a most favored nations --

6 A. That's not what I said, I said it could, but I can't
7 speak specifically that it would.

8 Q. You've never requested a commercial insurer to include
9 an MFN in a contract between Metro Health and a
10 commercial insurer, have you?

11 A. Not to my knowledge.

12 Q. You didn't ask Blue Cross to include an MFN in the
13 2008 letter of understanding, did you?

14 A. I did not.

15 Q. You understood that Blue Cross wanted the MFN in the
16 2008 letter of understanding, right?

17 A. They requested it, yes.

18 Q. And the 2008 letter of understanding resulted in Metro
19 Health receiving greater reimbursements from Blue
20 Cross than Metro Health had previously received,
21 right?

22 A. We received --

23 MR. STENERSON: Object to foundation.

24 A. I'm sorry, we received greater reimbursement because
25 our cost structure changed, not because we gave a most

TIMOTHY SUSTERICH
November 20, 2012

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1 focus off another item that I truly want, and then it
2 allows me to get to where I need to on that particular
3 issue if I give on the other.

4 BY MR. STENERSON:

5 Q. And in your 13 years' experience negotiating payer
6 contracts, is that a tactic that both payers and
7 hospitals use?

8 A. Yes.

9 Q. Would you be surprised if a payer did not use those
10 tactics?

11 MS. BHAT: Objection to form.

12 A. I always suspect it. Whether they are or they're not,
13 I can't speak to, but I would suspect that they do.

14 BY MR. STENERSON:

15 Q. So in a negotiation, you expect that the negotiator on
16 the other side is saying things that are important to
17 him when they really may not be?

18 A. Yes --

19 MS. BHAT: Objection to form.

20 A. -- that is possible.

21 BY MR. STENERSON:

22 Q. In 2008, did you make any independent assessment as to
23 how important the most favored pricing clause was to
24 Mr. Darland and Blue Cross?

25 A. I didn't, because it didn't concern me, and so whether

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1 or not it was important to him or to Blue Cross or
2 not, or him, didn't really concern me, because I
3 didn't -- I wasn't concerned about the language,
4 because I didn't believe it was going to affect us.

5 Q. Okay. And did it ultimately affect you?

6 A. It has not to date.

7 Q. And if it did affect negotiations with payers at Metro
8 Health, are you the person who would be aware of that?

9 MS. BHAT: Objection.

10 MR. MATHESON: Objection to foundation.

11 A. Ask that again, please.

12 BY MR. STENERSON:

13 Q. Sure. If the most favored pricing provision did have
14 an effect on Metro Health, would you be the person
15 that would be aware of it?

16 A. Yes.

17 Q. If you could look at Government Exhibit 2 with me,
18 please, there were some --

19 A. Which one is that?

20 Q. It's the March 30, 2008, email traffic from you to
21 Mr. Darland, Government 2.

22 A. I'm looking. Here it is.

23 Q. Mr. Darland writes: I'm afraid there's extreme
24 emphasis being placed on the discount comparison to
25 Priority. Do you see that?

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November 20, 2012

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1 A. Yes, I do.

2 Q. Would that be an example of a negotiator trying to
3 make you think something was important?

4 MS. BHAT: Objection to form and
5 foundation.

6 A. Certainly.

7 BY MR. STENERSON:

8 Q. Again, this was a negotiation between Metro Health and
9 Blue Cross, in which Metro Health had initiated
10 seeking higher reimbursements from Blue Cross,
11 correct?

12 A. That's correct.

13 Q. Did you get the sense that Blue Cross was resistant to
14 any increase?

15 MS. BHAT: Objection to foundation.

16 A. There certainly was discussion about whether they
17 should consider it, and ultimately they did.

18 BY MR. STENERSON:

19 Q. Did anyone from Blue Cross ever tell you they were
20 concerned that higher reimbursements from Blue Cross
21 could be used to subsidize their competitors?

22 A. I don't recall that discussion, if it occurred.

23 Q. If you could take out Government Number 3, please.

24 A. Okay.

25 Q. Counsel read you the statement in the first paragraph:

TIMOTHY SUSTERICH
November 20, 2012

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1 please, and this is dated February 10, 2010, is that
2 right?

3 A. That's correct.

4 Q. And this is Metro Health's attestation for fiscal year
5 2009?

6 A. Fiscal 2009, yes.

7 Q. So am I correct that that is July 1st, 2008, through
8 June 30th, 2009?

9 A. That's correct.

10 Q. And that data would have been available as of
11 February 10, 2010?

12 A. It was, yes.

13 Q. And, if I understand correctly, you attested in
14 February of 2010 that the differential between Blue
15 Cross and the aggregate of its competitors at Metro
16 Health was four percentage points, correct?

17 A. Correct.

18 Q. I'm going to ask you to do the math in your head
19 again. Do you know if the four percentage point
20 difference reflected in your February 10, 2010, letter
21 is greater than ten percentage points?

22 MS. BHAT: Object to form.

23 BY MR. STENERSON:

24 Q. I'm sorry, is greater than ten percent difference?

25 MS. BHAT: Object to form.

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November 20, 2012

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1 A. I don't believe it would violate the language, no.

2 BY MR. STENERSON:

3 Q. That would -- let me ask it this way. So in Blue
4 Cross 1059 -- well, strike that.

5 Was there ever a requirement under Roman
6 Ten in fiscal year 2009 to meet the five or ten
7 percentage point differential --

8 MS. BHAT: Object to form.

9 BY MR. STENERSON:

10 Q. -- in the clause?

11 A. Not the five or ten percent, no.

12 Q. But if there was, do you believe the differential that
13 existed in fiscal year 2009 was sufficient to exceed
14 that differential?

15 A. If I'm doing the math correctly, I think it's only
16 just over a half a percent, so it would definitely not
17 violate the language of the most favored pricing.

18 Q. And did Metro Health -- well, strike that.

19 From June of 2008 until February of 2010,
20 when you attested to this, did Metro Health raise any
21 commercial payer's rate of reimbursement because of
22 the most favored pricing provision in Blue Cross 1059?

23 A. No.

24 MS. BHAT: Object to form.

25 MR. MATHESON: And foundation.

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November 20, 2012

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1 BY MR. STENERSON:

2 Q. And if Metro Health in fact did raise any commercial
3 payer's reimbursement rate from June 2008 until
4 February of 2010, would you be the person that would
5 have known about it?

6 MS. BHAT: Object to form.

7 MR. MATHESON: Object to foundation.

8 A. I would have known about it, yes.

9 BY MR. STENERSON:

10 Q. And, sir, if you could then take out Blue Cross 1062,
11 just so I can deal with some objections, when you say
12 you would have known about it, why are you confident
13 in that answer?

14 A. Normally, I sign most of the changes in reimbursement
15 agreements.

16 Q. And, in addition, you're the individual with focus on
17 the hospital contract?

18 A. Correct.

19 Q. And was that true from June of 19 -- strike that.

20 Was that true from June of 2008 until
21 February of 2010?

22 A. It was.

23 Q. And has that also been true from February of 2010
24 until October 13th, 2010?

25 A. That's correct.

TIMOTHY SUSTERICH
November 20, 2012

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1 Q. So if you could look at Blue Cross 1062 for me,
2 please?

3 A. Yes.

4 Q. There was some testimony about the eight point
5 differential in Blue Cross 1062. Do you recall that?

6 A. I do.

7 Q. Do you agree with me that that differential in Blue
8 Cross 1062 is greater than the differential that
9 existed in Government's 4?

10 A. I do.

11 Q. And the year that was being calculated in Blue Cross
12 1062 is for fiscal year 2010, correct?

13 A. That's correct.

14 Q. And that would be for the period of time July 1st,
15 2009, through June 30th, 2010?

16 A. That's correct.

17 Q. Did Metro Health -- strike that.

18 From February 10, 2010, until October 13th,
19 2010, did Metro Health raise any commercial payer's
20 reimbursement rate because of the most favored pricing
21 provision in Blue Cross 1059?

22 MS. BHAT: Object to foundation.

23 A. No.

24 BY MR. STENERSON:

25 Q. In response to counsel's questions on 1062, you

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1 testified about a number of reasons that the
2 differential between Blue Cross and its competitors
3 could change between fiscal year 2009 and fiscal year
4 2010. Do you recall that?

5 A. I do.

6 Q. As you sit here today, sir, do you believe that any of
7 the increase in differential from fiscal year 2009 to
8 2010 was caused by Metro Health raising any commercial
9 payer's rate because of the most favored pricing
10 clause in the Blue Cross contract?

11 MS. BHAT: Objection to form and
12 foundation.

13 A. It was not.

14 BY MR. STENERSON:

15 Q. And how certain are you of that, sir?

16 A. Certain.

17 MR. STENERSON: Let's take a break.

18 VIDEO TECHNICIAN: The time is 3:24 p.m.
19 We are now off the record.

20 (Off the record at 3:24 p.m.)

21 (Back on the record at 3:33 p.m.)

22 VIDEO TECHNICIAN: We are back on the
23 record. The time is 3:33 p.m.

24 BY MR. STENERSON:

25 Q. Sir, Blue Cross 1062 is dated October 13th, 2010, is

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1 that correct?

2 A. It is.

3 Q. And at that time, what was the differential between
4 Blue Cross and the aggregate of its commercial
5 competitors in reimbursement rates at Metro Health?

6 A. Eight percentage points.

7 Q. At any time since October 13th, 2010, through today,
8 have you -- well, strike that.

9 I believe you also said that you have
10 recently not calculated what the current differential
11 is between Blue Cross and the aggregate of its
12 commercial payers, is that correct?

13 A. That is correct.

14 Q. Regardless of what the result of any such analysis
15 would show, since October 13th, 2010, have you, on
16 behalf of Metro Health, negotiated any commercial
17 payer contract as a result of -- strike that.
18 Withdraw that and let me try it again.

19 Regardless of what the result of any such
20 calculation would show, to the extent that the
21 differential between Blue Cross and its competitors
22 has changed since you did the calculation in Blue
23 Cross 1062, would any such change have been caused by
24 any renegotiation of a commercial payer contract by
25 Metro Health caused by the most favored pricing

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November 20, 2012

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1 provision?

2 MR. ETTINGER: Object.

3 MR. MATHESON: To the form.

4 MS. BHAT: And the foundation.

5 MR. ETTINGER: I think you could skip about
6 six of your clauses and get where you want to go
7 there.

8 BY MR. STENERSON:

9 Q. Let me break it up. Since October 13th, 2010, has
10 Metro Health renegotiated any commercial payer
11 contract because of the most favored pricing
12 provision?

13 A. No.

14 MS. BHAT: Object to foundation.

15 BY MR. STENERSON:

16 Q. Do you believe the current differential that exists
17 between Blue Cross and its competitors at Metro Health
18 that -- strike that.

19 Do you believe that the differential that
20 exists today between Blue Cross and any of its
21 commercial competitors at Metro Health has been
22 affected by the most favored pricing provision in Blue
23 Cross 1059?

24 MR. MATHESON: Object to the foundation.

25 A. No.

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1 BY MR. STENERSON:

2 Q. There was some testimony earlier about client-specific
3 discounts. Do you recall that?

4 A. Yes, I do.

5 Q. Is there a reason why Metro Health would agree to a
6 client-specific discount?

7 A. No specific reason we wouldn't.

8 Q. Would it consider agreeing to it, if asked?

9 A. And we have, yes.

10 Q. And have you agreed to all requests for
11 client-specific discounts?

12 A. I don't believe so.

13 Q. And do you know what Aetna's reimbursement rate was in
14 2008?

15 A. No, I don't.

16 Q. To the extent Aetna sought a client-specific
17 discount -- well, strike that.

18 If Aetna sought a client-specific discount
19 of 30 percent off of charges for a payment rate of 70
20 percent, is there anything in the most favored pricing
21 provision that you believe would prevent you from
22 agreeing to that request?

23 A. No.

24 MS. BHAT: Objection to form.

25 BY MR. STENERSON:

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1 Q. Sir, has the most favored pricing provision in 1059
2 ever caused you, on behalf of Metro Health, to refuse
3 to provide a deeper discount to any commercial payer?

4 MR. MATHESON: Object to the foundation and
5 the form.

6 A. No.

7 BY MR. STENERSON:

8 Q. And does that include the fact that -- strike that.

9 Has the most favored pricing provision at
10 Blue Cross 1059 ever caused you, on behalf of Metro
11 Health, to refuse to provide Aetna a deeper discount
12 on any of its business?

13 A. No, I've not considered that language to make me move
14 in any one way or direction on any particular
15 contract.

16 Q. When you say that language, you're referring to the
17 most favored pricing language?

18 A. I am.

19 Q. And regardless of what the specific terms state in
20 Blue Cross 1059, am I correct in understanding that
21 your actions and practices as a negotiator on behalf
22 of Metro Health since June of 2008 through today have
23 been consistent with what your testimony is here
24 today?

25 MS. BHAT: Objection to form.

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1 A. It is.

2 MR. STENERSON: Thank you.

3 THE WITNESS: Yup.

4 MR. ETTINGER: We done?

5 VIDEO TECHNICIAN: This concludes today's
6 deposition. The time is 3:54 p.m. We are now off the
7 record.

8 (The deposition was concluded at 3:54 p.m.
9 Signature of the witness was not requested by
10 counsel for the respective parties hereto.)

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EXHIBIT 17

BRIAN L. RODGERS
December 7, 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 BRIAN L. RODGERS,
17 Taken at 4000 Wellness Drive,
18 Midland, Michigan,
19 Commencing at 10:18 a.m.,
20 Friday, December 7, 2012,
21 Before Lezlie A. Setchell, CSR-2404, RPR, CRR.

22
23
24
25

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1 create this?

2 A. Well, again, we were looking at the MFN differential
3 to see really where we are, where by contract. So,
4 for example, you can see in the Aetna, you know, our
5 contract is a 20% discount. At Midland there's a
6 40.3% discount. So there's a 20.3% differential.

7 Q. And when you, you say 40.3%, you're talking about the
8 Blue Cross discount?

9 A. Right.

10 Q. Okay.

11 A. And I think probably, that probably the highlighting
12 is the Gladwin discount from this analysis was saying
13 7.4% for Blue Cross, and yet we have a 20% Aetna
14 discount. So it actually would not have, you know --
15 it would have been below a Most Favored Nations
16 discount. So that's why we were, we were talking
17 about Clare and Gladwin, bundling them together. And
18 I think that's ultimately where this led. There's
19 probably another version of this somewhere where we
20 combined them together.

21 Q. And why did you want to look at this information?

22 A. Again, I didn't want to agree to something I couldn't
23 honor with Blue Cross.

24 Q. Did you want to avoid having to raise other's rates?

25 MR. STENERSON: Objection to form, leading.

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1 A. I guess you could say it that way. We weren't going
2 to raise other's rates. I wouldn't have agreed to it
3 with Blue Cross.

4 MS. FITZPATRICK: I think this would be a
5 good time for a break. Mr. Ettinger, if I could ask,
6 if there's a version of this document that --

7 MR. ETTINGER: I don't think we have time
8 to do that.

9 MS. FITZPATRICK: Not today but if we could
10 follow up.

11 MR. ETTINGER: Actually, if you don't have
12 one that's not blacked out, yeah, sure.

13 MS. FITZPATRICK: Yeah, if you have one
14 that's readable, I would appreciate getting it.

15 MR. ETTINGER: I'm sure I don't but we can
16 find one at some point if it exists.

17 MS. FITZPATRICK: I would appreciate it.

18 MR. ETTINGER: Okay. So do you want to
19 just take a half hour and then try to be back at 1:15?

20 MS. FITZPATRICK: Sounds good.

21 MR. ETTINGER: Okay.

22 VIDEO TECHNICIAN: The time is now
23 12:41 p.m. We are off the record.

24 (Lunch recess taken at 12:41 p.m.)

25 (Back on the record at 1:23 p.m.)

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1 VIDEO TECHNICIAN: We are back on the
2 record. The time is 1:23 p.m. This marks the
3 beginning of tape number three.

4 MARKED FOR IDENTIFICATION:
5 GOVERNMENT RODGERS EXHIBIT 15
6 1:24 p.m.

7 BY MS. FITZPATRICK:

8 Q. Welcome back, Mr. Rodgers.

9 A. Thank you.

10 Q. I've handed you what's been marked Government Exhibit
11 Number 15. It's an email to you from Fred Kagarise
12 dated September 23rd, 2008, and at the bottom of the
13 page is the Bates Number 4381. This was produced by
14 MidMichigan.

15 Do you know what information this is that
16 Mr. Kagarise is providing to you?

17 MR. STENERSON: Object to the form.

18 A. Yeah, this is the audit that Blue Cross did that they
19 thought we had increased our rates too much.
20 Remember, I referenced it earlier as the seven figure,
21 and so they said in 2005 we raised our rates too much,
22 and because of that, they owed us 1.1 million.

23 BY MS. FITZPATRICK:

24 Q. You owed them?

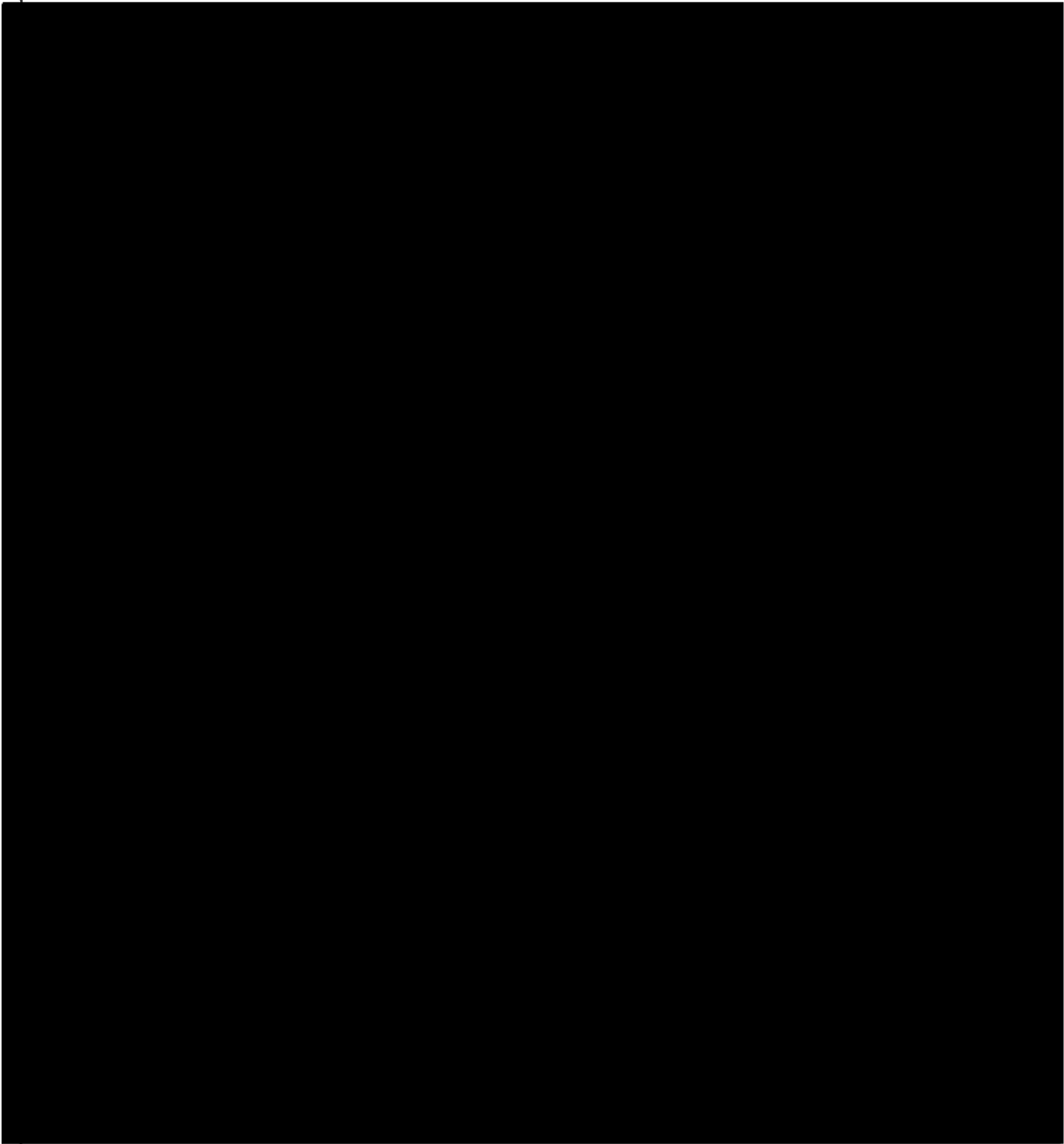
25 A. We owed them.

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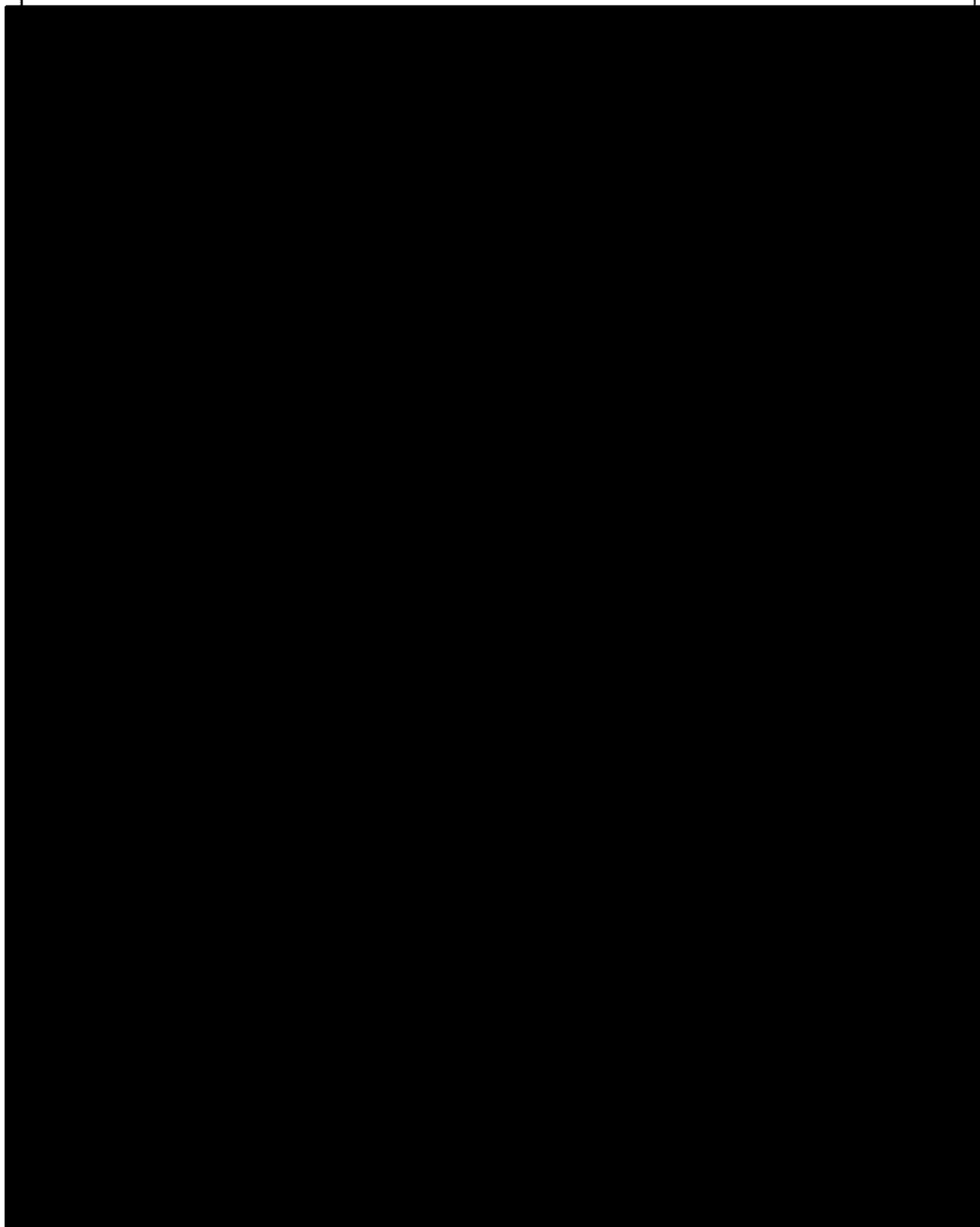
1 discount, the MFN plus prohibited that kind of
2 situation; is that right?

3 MR. STENERSON: Object to the form.



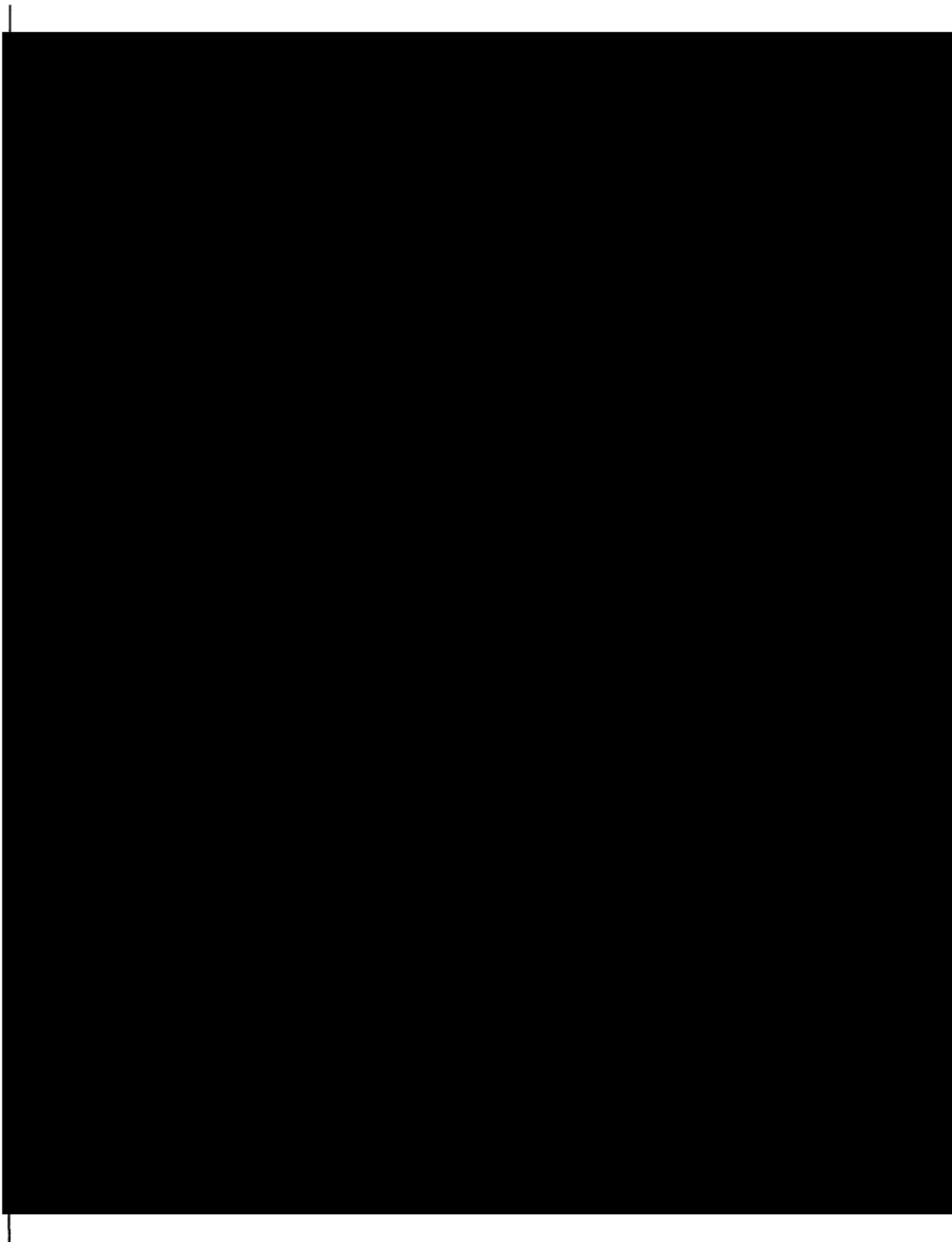
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1 Q. And that was 4% on all --

2 A. 4 percentage points, yes, 4 percentage points.

3 Q. So it's 4 percentage points?

4 A. Not what they were paying yesterday plus 4%. It was
5 instead of it being a 41% discount, it would be a 4%
6 smaller discount.

7 Q. So just to understand, do you mean percent or
8 percentage points?

9 A. Percentage points, basis points.

10 Q. Okay. All right. Now that 4%, was that across all
11 Blue Cross business at MidMichigan?

12 A. Yes, yes.

13 Q. Not just for the Dow business?

14 A. Correct.

15 Q. So it would potentially affect other Blue Cross
16 customers as well?

17 A. Definitely would.

18 Q. Okay. And so does that mean that other customers --
19 strike that.

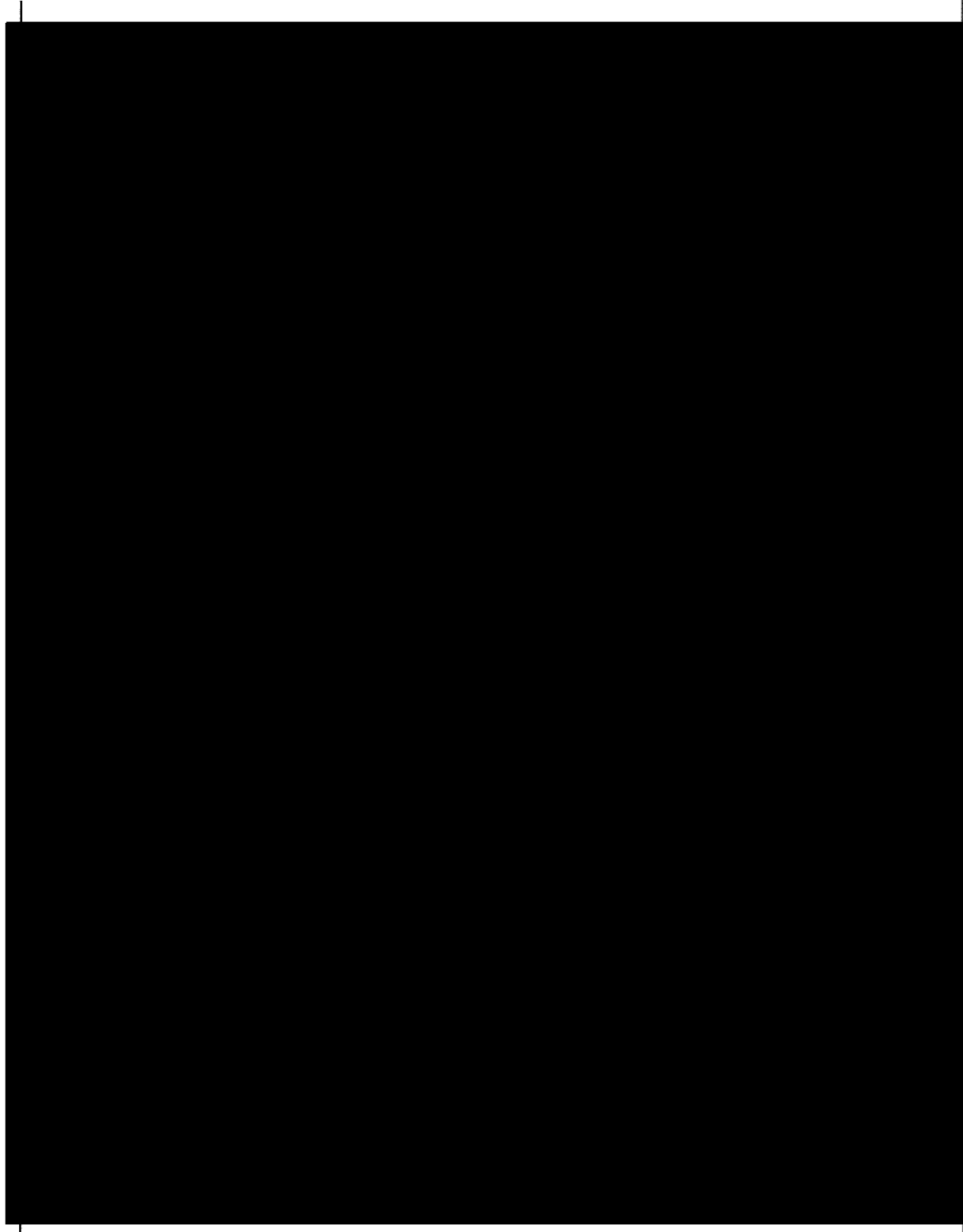
20 Does that mean that the unit price for
21 other customers would increase as a result of this?

22 MR. STENERSON: Objection, incomplete
23 hypothetical.

24 A. For self-funded employers, it would be dollar for
25 dollar. For, you know, how Blue Cross would

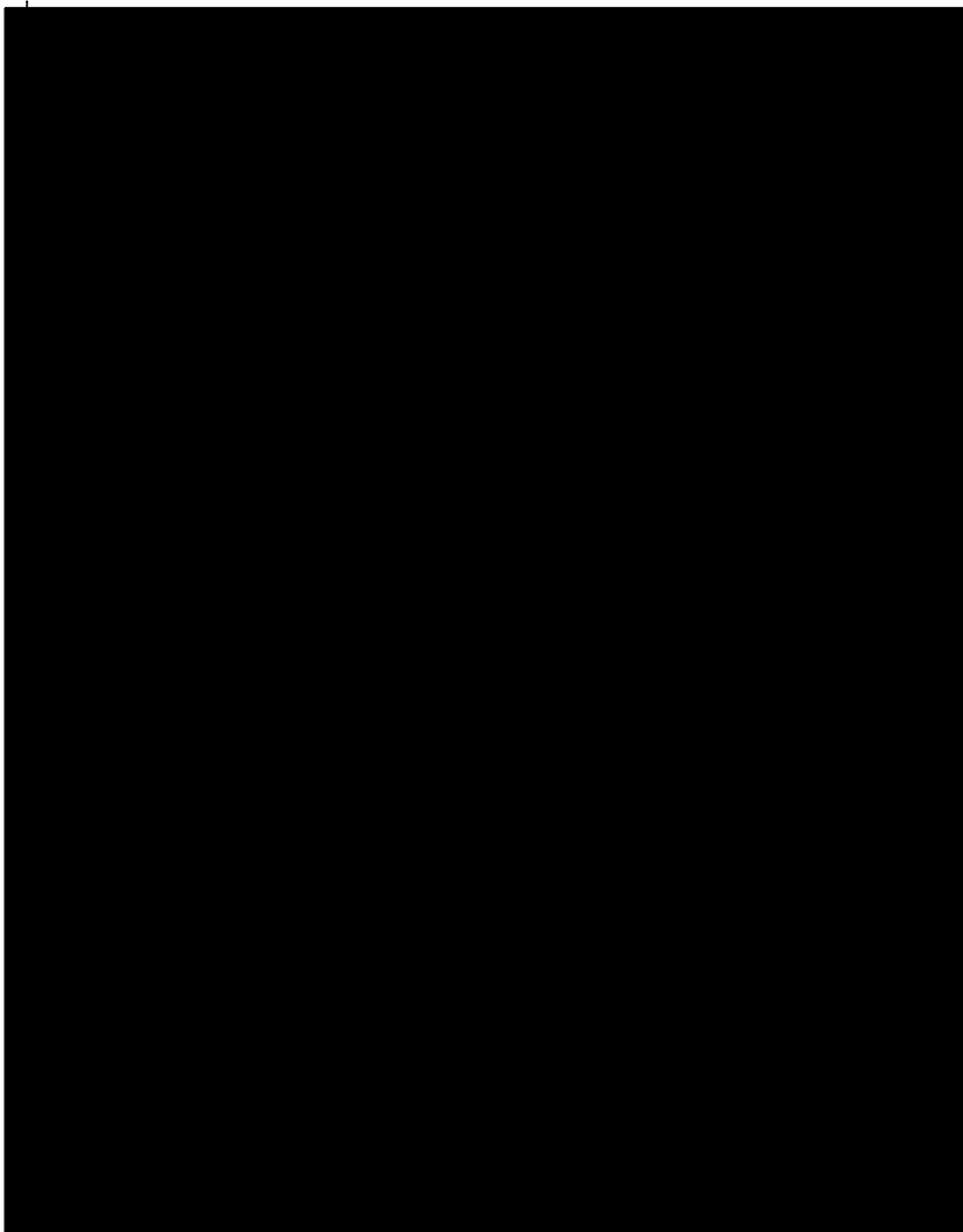
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7 Q. Okay. I'm just curious, did MidMichigan ever
8 volunteer to enter a Most Favored Nations clause with
9 Blue Cross Blue Shield of Michigan?

10 MR. STENERSON: Object to the form.

11 A. Volunteer?

12 BY MR. SUKENIK:

13 Q. Of its own volition?

14 A. No.

15 Q. You never requested for --

16 A. No.

17 Q. -- for the clause to be added to your contract?

18 A. No. It was their initiative, not ours.

19 Q. Okay. Were you reluctant to agree to the clause?

20 A. No, because it didn't matter, other than watching
21 closely what the impact would be at Clare and Gladwin.

22 Q. But for those two hospitals, it was a concern?

23 MR. STENERSON: Object to the form.

24 A. You know, I just had to be careful. It wasn't really
25 a concern because we weren't going to change other

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1 payers' discounts, so...

2 BY MR. SUKENIK:

3 Q. Just to be clear, would the Blue Cross MFN have
4 required you potentially to increase other payers'
5 rates of reimbursement in order to comply with the
6 MFN?

7 MR. STENERSON: Object to the form.

8 MR. ETTINGER: Objection.

9 A. Ask the question again.

10 BY MR. SUKENIK:

11 Q. Sure. Would the Blue Cross MFN have potentially
12 required you to increase other payers' reimbursement
13 in order to comply with the MFN?

14 MR. STENERSON: Same objection.

15 A. I wouldn't have agreed to one that would have required
16 us to do that.

17 BY MR. SUKENIK:

18 Q. Fair enough. I'm curious. Is it -- is it currently
19 in MidMichigan's financial interest to serve
20 additional patients of MidMichigan was reimbursed at
21 the rates paid by Blue Cross?

22 A. Is it beneficial? Yes, it is.

23 Q. What about if it was to be reimbursed at 5% above that
24 rate?

25 MR. STENERSON: Object to the form.

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1 A. That would be beneficial.

2 BY MR. SUKENIK:

3 Q. Okay. So if another insurer could bring incremental
4 volume to MidMichigan at Blue Cross's rate, let's say,
5 that would benefit the hospital?

6 MR. STENERSON: Object to the form.

7 A. If it's new business. If it's moved business, it
8 wouldn't, but if it's new business, it would.

9 BY MR. SUKENIK:

10 Q. What about if another insurer could bring incremental
11 volume to the hospital at a rate that's 5% above Blue
12 Cross's rate?

13 A. Would that be beneficial.

14 MR. STENERSON: Object to the form.

15 BY MR. SUKENIK:

16 Q. Yes, would that be beneficial?

17 A. Yes, it would.

18 Q. Okay. Now understanding the various differentials
19 that you have in place, the Blue Cross MFN plus that's
20 in existence with Midland and with Gratiot, that would
21 prohibit you from offering a rate within 5% of Blue
22 Cross's even if it would benefit the hospital; is that
23 right?

24 MR. STENERSON: Object to the form.

25 A. Yes.

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1 to respond to a request for information from the
2 Department of Justice?

3 A. Yes, I believe it was now that you say that.

4 Q. So this is not --

5 A. The CID, that was in the CID.

6 Q. Yes, sir. So this was not a document that was kept in
7 your files in the ordinary course of your business,
8 correct?

9 MS. FITZPATRICK: Object to form.

10 A. I think that is correct.

11 You know, this --

12 MR. ETTINGER: Just answer the question.

13 THE WITNESS: Okay.

14 BY MR. STENERSON:

15 Q. So let me have you now look at -- well, strike that.

16 Would you agree with me, sir, that if you
17 compared the composite rate of Blue Cross and BCN on
18 Rodgers 3 to the rates of the other payers, no one is
19 even within 20 basis points of the Blue Cross rate?

20 A. That's correct.

21 Q. And you said you've been at the hospital, involved
22 with hospital contracting for many decades?

23 A. Yeah, yes, that's correct.

24 Q. How long has the discount gap that Blue Cross has over
25 its competitors existed?

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1 MR. SUKENIK: Object to foundation.

2 A. As long as I can remember. You know, it's gotten --
3 the differential has grown over time. So I would say
4 in the early to mid '90s it wasn't as dramatic as it
5 is today. It's grown, the differential's grown.

6 BY MR. STENERSON:

7 Q. You think it's grown since the mid '90s?

8 A. Yes.

9 Q. Do you also have in front of you the document that was
10 previously marked Rodgers 17?

11 A. Yes.

12 Q. And Rodgers 17 contains Roman IX, the favored pricing
13 provision that you've been talking about a bit today;
14 is that correct?

15 A. Yes, yes, it does.

16 Q. Do you believe, sir, that the favored pricing
17 provision in Rodgers 17 has anything, whatsoever, to
18 do with the expanding discount gap that Blue Cross has
19 experienced at your hospitals?

20 MR. SUKENIK: Object to form.

21 MS. FITZPATRICK: Objection to form,
22 foundation.

23 A. No.

24 BY MR. STENERSON:

25 Q. And if somebody suggested it did, what would your

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1 opinion be on that?

2 A. I would say it did not affect it.

3 Q. Do you have any doubt?

4 A. No doubt.

5 MS. FITZPATRICK: Objection to form.

6 BY MR. STENERSON:

7 Q. And why are you so certain?

8 A. Because of the differential and the -- I mean, the
9 reason that Blue Cross is growing is their deeper
10 discounts. It's not a function of the MFN.

11 Q. And if you could look with me, sir, on Rodgers
12 Number 3 under leased network, you have Aetna there
13 first; do you see that?

14 A. Yes.

15 Q. And I'd like you to look at what I've put in front of
16 you marked as Blue Cross 1810. It should be on the
17 top.

18 A. Got it. They're backwards. Got it.

19 Q. Is this the agreement that is currently -- well,
20 strike that.

21 Do you believe Blue Cross 1810 to be the
22 agreement that's referenced under Aetna on Rodgers
23 Number 3?

24 A. Yes, I do.

25 Q. And at the time you -- were you involved in

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1 negotiating this agreement with PPOM?

2 A. I was.

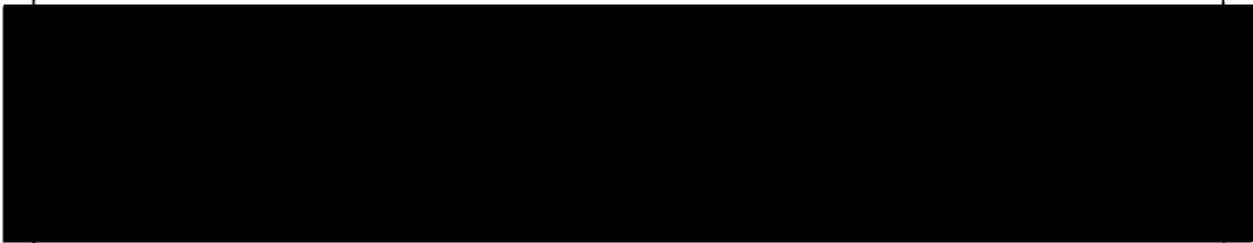
3 Q. And can you turn with me, sir, to Page, in the bottom
4 right, 931?

5 A. Yes.



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5 Q. So is the proper interpretation of Blue Cross 1810
6 that the hospital discount for PPOM in this agreement
7 is [REDACTED] of charge?

8 A. Yes, and then they're paying a fee.

9 MR. SUKENIK: Object to form.

10 BY MR. STENERSON:

11 Q. And do I understand that that also applies to the
12 Aetna business?

13 A. That's correct.

14 Q. And do you see Clause B in Blue Cross 1810?

15 A. Yes.

16 Q. And do you know the difference --

17 A. I'm sorry, under definitions?

18 Q. No, sir. So Blue Cross 1810, still on Page 931.

19 A. Okay.

20 Q. In A it says for Aetna insurers; do you see that?

21 A. Yes.

22 Q. And you just told me it was a [REDACTED] discount off of
23 charge, correct?

24 A. Right.

25 Q. And that was what's on Rodgers Number 3?

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1 A. That's correct.

2 Q. And then in B -- well, strike that.

3 You understand that PPOM is a network that
4 Aetna both uses itself and rents?

5 MR. SUKENIK: Object, leading.

6 A. I understand that.

7 BY MR. STENERSON:

8 Q. And in Section B, it says insurers other than Aetna;
9 do you see that?

10 A. Yes.

11 Q. Is there a different discount rate for insurers other
12 than Aetna?

13 A. Yes.

14 Q. And what is that?

15 A. That is [REDACTED]

16 Q. Okay. And is that what is reflected on Rodgers
17 Number 3 for Cofinity?

18 A. Yes, sir.

19 Q. And these rates were set in July of '06; is that
20 correct?

21 A. Yes.

22 Q. In July of '06 when those rates were set, was your
23 hospital subject to a most favored pricing provision
24 with Blue Cross?

25 A. No.

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December 7, 2012

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1 Q. Do you recall the circumstances of Aetna approaching
2 you to ask for a differential between Aetna business
3 and non-Aetna business?

4 MR. SUKENIK: Object to form.

5 A. Aetna didn't ask. We did.

6 BY MR. STENERSON:

7 Q. Why did you ask?

8 A. As it pertains to this PPOM agreement?

9 Q. Yes, sir.

10 A. We were giving a deeper discount to Aetna because it's
11 predominantly Dow. Cofinity on the other hand is a
12 competitor, direct competitor with ConnectCare, so we
13 didn't want them to have discounts richer than we have
14 in ConnectCare.

15 Q. Okay. And if you look at ConnectCare, they had a [REDACTED]
16 rate on Rodgers Number 3?

17 A. Yes.

18 Q. So your managed care strategy was to intentionally set
19 the Cofinity rate at a slightly higher amount than
20 ConnectCare?

21 A. That's right.

22 MS. FITZPATRICK: Objection to form.

23 BY MR. STENERSON:

24 Q. Set the discount at a slightly less deep amount?

25 MS. FITZPATRICK: Same objection.

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1 A. Right.

2 BY MR. STENERSON:

3 Q. In order to protect the competitiveness of
4 ConnectCare?

5 A. Yes.

6 MS. FITZPATRICK: Objection to form.

7 BY MR. STENERSON:

8 Q. And at the time you did that, did you have a favored
9 pricing provision with Blue Cross?

10 A. Did not.

11 Q. At any time after July, '06, did Aetna approach you
12 for a discount across the board for their services at
13 MidMichigan?

14 MR. SUKENIK: Object to form.

15 A. Ask the question again.

16 BY MR. STENERSON:

17 Q. Sure. Did, did Aetna at any time after July of '06
18 ever attempt to negotiate a deeper discount for their
19 entire book of business?

20 MR. SUKENIK: Same objection.

21 A. We've renegotiated a contract but it's essentially at
22 the same terms.

23 BY MR. STENERSON:

24 Q. And that was in --

25 A. Same financial terms.

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1 Q. That was in 2012?

2 A. Yes.

3 Q. Okay. And we'll look at that contract a bit later.
4 Between July of '06 and the signature of the new
5 contract, were there any other efforts by Aetna to
6 negotiate a deeper discount on its entire book of
7 business at your hospital?

8 MR. SUKENIK: Object to form.

9 A. Not that I recall.

10 BY MR. STENERSON:

11 Q. And was the hospital interested at any time from July,
12 '06 until the new contract in 2012 in giving Aetna a
13 deeper discount at MidMichigan hospitals?

14 MR. SUKENIK: Object to form.

15 A. No.

16 BY MR. STENERSON:

17 Q. Is there anything about the most favored pricing
18 provision in Rodgers 17 that affected your decision to
19 not want to give Aetna a deeper discount at
20 MidMichigan hospitals at any time after July of 2008?

21 MR. SUKENIK: Object to form.

22 A. No.

23 BY MR. STENERSON:

24 Q. Is there anything in the most favored pricing
25 provision that's contained in Rodgers 17 that affected

BRIAN L. RODGERS
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1 your decision to provide non-Aetna patients a deeper
2 discount at MidMichigan hospitals?

3 MS. FITZPATRICK: Objection, form.

4 MR. SUKENIK: Objection.

5 A. Are you talking about Cofinity?

6 BY MR. STENERSON:

7 Q. Yes, sir.

8 A. Yes. So I think I -- it's no different for Cofinity
9 than it was for Aetna. Not sure which way you phrased
10 the question.

11 Q. Right. So let me ask it this way. Did the favored
12 pricing provision in Rodgers 17 interfere with you in
13 any way to give a discount to Cofinity that you
14 otherwise wanted to give them?

15 MR. SUKENIK: Object to form.

16 A. Did not.

17 BY MR. STENERSON:

18 Q. And, Mr. Rodgers, if you were interested in
19 conceptually more competitive payer markets in or
20 around your hospital, why didn't you just drop the
21 PPOM rate in the July 2006 contract to that of a rate
22 closer to Blue Cross?

23 MR. SUKENIK: Objection, asked and
24 answered.

25 A. We couldn't afford to.

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1 BY MR. STENERSON:

2 Q. Did that have anything to do with most favored pricing
3 provision?

4 A. It has to do with too deep of a Blue Cross discount.

5 Q. Okay. And that was in 2006, correct?

6 A. Uh-huh.

7 Q. Was that a yes?

8 A. Yes, I'm sorry, that's a yes.

9 Q. And when MidMichigan executed the Blue Cross agreement
10 that's in Rodgers Number 17 that contained the most
11 favored pricing provision, after that period of time,
12 why didn't MidMichigan just agree to lower Aetna's
13 rate that's reflected in 1810 to just above the
14 differential in your agreement with Blue Cross?

15 MS. FITZPATRICK: Objection to form.

16 MR. SUKENIK: Objection.

17 A. We never would, you know, we wouldn't have with Dow.
18 We just never would have, again, because it would
19 bring us to our knees.

20 BY MR. STENERSON:

21 Q. But your unwillingness to lower the rate to Aetna at
22 MidMichigan hospitals has nothing to do with the terms
23 of the favored pricing provision in 17, correct?

24 A. That's correct.

25 MS. FITZPATRICK: Objection to form.

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1 MR. SUKENIK: Objection.

2 BY MR. STENERSON:

3 Q. Now, sir, if you could look at what I've marked as
4 Blue Cross 1811; do you have that?

5 A. I do.

6 Q. And this is a September 1st, 2007 agreement with
7 Priority Health and MidMichigan Health Network; is
8 that correct?

9 A. Yes, sir.

10 Q. Do you recall if prior to September 1st, 2007, you had
11 a network agreement with Priority?

12 A. I think this was our first agreement with Priority.

13 Q. Okay. And did any Blue Cross pricing -- strike that.

14 Did any Blue Cross most favored pricing
15 provision interfere with your ability to execute the
16 agreement that's in 1811?

17 A. No.

18 Q. And I'd like you to look at the rate, sir, on Page 22.
19 And what rate did you agree to give to Priority in
20 September of '07?

21 A. 19% discount for HMO. Sorry.

22 Q. And thank you for clarifying. That's for Priority's
23 HMO product, correct?

24 A. Right.

25 Q. And that's what you have on Rodgers 3 as well,

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1 correct?

2 A. That is correct.

3 Q. And if you could look at 1812 for me, please, Blue
4 Cross 1812, it's dated the same day, September 1st,
5 2007. Do you understand the difference between Blue
6 Cross 1811 and Blue Cross 1812?

7 A. This is a PPO contract rather than an HMO.

8 Q. And what's the difference between the two?

9 A. Primarily, although there's other provisions, but the
10 discount is different.

11 Q. Okay. And what discount in September of 2007 was
12 MidMichigan willing to provide to Priority Health for
13 its PPO product?

14 A. Well, looking at Exhibit 3, it's 12%.

15 Q. Okay, and if you could look at --

16 A. I'm just confirming that in the contract.

17 Q. Right. If you look at Page 18 of Blue Cross 1812?

18 A. Yeah, 12%.

19 Q. And so it was correct it was 88% of charges?

20 A. That's correct.

21 Q. Why the willingness to give a deeper discount to
22 Priority's HMO versus its PPO?

23 A. The competitive nature of the PPO versus ConnectCare.
24 We wanted to keep the PPO competitive. I mean, we
25 want -- we want Priority to be successful but we

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1 didn't want to be competing with ourselves. The HMO,
2 you know, we don't -- ConnectCare really doesn't
3 compete as directly with the HMO as it does with the
4 PPO.

5 Q. And why is that?

6 A. A different plan design. I mean, this market doesn't
7 have a lot of HMO penetration.

8 Q. And this was new entry for an HMO with Priority in
9 September of 2007?

10 A. Both the PPO and HMO, correct.

11 Q. And at any time since Rodgers 17 was signed that
12 contains the favored pricing provision with Blue
13 Cross, did MidMichigan seek to give Priority a deeper
14 discount on either its HMO or PPO business?

15 MS. FITZPATRICK: Objection, form.

16 A. No.

17 BY MR. STENERSON:

18 Q. And did that have anything to do with the favored
19 pricing clause in the hospital's Blue Cross contract?

20 A. No.

21 Q. Mr. Rodgers, if you could take what I've marked as
22 Blue Cross 1813, and if you could identify that for
23 the record?

24 A. This is the Health Alliance Plan contract.

25 Q. And this is dated when?

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1 A. I think it's December of 2000.

2 Q. Well, let's look.

3 A. It's December, 2000.

4 Q. 2000 or 2007?

5 A. I'm sorry, 2007.

6 Q. And it's your signature on Page 19?

7 A. Yes.

8 Q. And what rate were you willing to give HAP in 2000 --
9 December of 2007?

10 MS. FITZPATRICK: Objection to form.

11 A. Well, it varied by service but the hospitals were at
12 10% discount.

13 BY MR. STENERSON:

14 Q. And why was HAP not able to negotiate as deep of a
15 discount as Priority had?

16 A. Very little membership in the area.

17 Q. And was this a new agreement for HAP in December of
18 2007?

19 A. First time with HAP, yes.

20 Q. And is it still in effect today?

21 A. It is.

22 Q. And are the two Priority agreements that we looked at
23 still in effect today?

24 A. Yes.

25 Q. At any time after you signed the most favored pricing

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1 provision that's contained in Rodgers 17, did the
2 hospital have any interest in giving a deeper discount
3 to HAP?

4 MS. FITZPATRICK: Objection to form.

5 A. No.

6 BY MR. STENERSON:

7 Q. And did that have anything to do with the fact that
8 you had a favored pricing provision in your Blue Cross
9 contract?

10 A. No.

11 Q. I'm going to have you look at what I've marked as Blue
12 Cross 1814; do you see that?

13 A. Yes.

14 Q. How long had you negotiated the United deal?

15 A. Years, many years.

16 Q. Do you recall it being as many as 10 years?

17 MS. FITZPATRICK: Objection to form.

18 A. It could, off and on, it could well be that.

19 BY MR. STENERSON:

20 Q. And when did you finally execute the United deal?

21 A. It was -- it was -- it was 1-1 probably of this year.

22 Q. The first page, if you look with me, it says
23 February 1st, 2012?

24 A. Okay, yeah, that would be right. Sorry.

25 Q. And what rate were you able to negotiate with for

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1 United?

2 If you look at Page 2, last Number 606 on
3 the bottom right.

4 A. 15% discount.

5 Q. That was for both inpatient and outpatient?

6 A. Yes. There was some -- generally, yes.

7 Q. And was the extended period of time over many years in
8 negotiating with United, was the problem the rate?

9 MS. FITZPATRICK: Objection to form.

10 A. No. It was the company.

11 BY MR. STENERSON:

12 Q. What do you mean by that?

13 A. I think I mentioned earlier that, you know, there's
14 people that are easy to work with and like Doug
15 Darland that I have respect for, we don't always
16 agree, and United Healthcare has never had people like
17 that. It's just been they're very challenging to work
18 with.

19 Q. But ultimately you did reach an agreement?

20 A. We did reach an agreement.

21 Q. A new agreement in February of 2012, correct?

22 A. That's correct.

23 Q. And did I understand you correctly that you believe at
24 that time there was a favored pricing provision in
25 effect in your Blue Cross contract?

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1 A. There was.

2 Q. Did the favored pricing provision that was in your
3 Blue Cross contract affect in any way your
4 negotiations with United?

5 MS. FITZPATRICK: Objection to form.

6 A. Did not.

7 BY MR. STENERSON:

8 Q. Did it affect the rate you were willing to agree to on
9 behalf of MidMichigan for United patients?

10 A. Did not.

11 Q. And also, if you could look back to Rodgers 3, and
12 HealthPlus is listed as a November 2009 contract; do
13 you see that?

14 A. Uh-huh.

15 Q. Do you know if that was a new contract for HealthPlus
16 at your hospitals?

17 A. Boy, I'm struggling with that date. That seems more
18 -- no, I don't think it was.

19 Q. Do you think it was a renewal?

20 A. I wonder if that -- that might be incorrect because I
21 think we've had a contract with HealthPlus longer than
22 that. That might be a HealthPlus Medicare Advantage
23 contract. I'm pretty certain we've had a HealthPlus
24 contract longer than that.

25 Q. Okay. If I told you that you have a HealthPlus

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1 contract that's entitled Integrated Healthcare Systems
2 Service Agreement, would that refresh your memory as
3 to what a November 2009 agreement may have referred
4 to?

5 A. Does it say Medicare Advantage? Is it limited to
6 Medicare Advantage? My speculation is it was -- it
7 could --

8 MR. ETTINGER: Don't speculate.

9 THE WITNESS: Okay.

10 BY MR. STENERSON:

11 Q. That's fine. For our purposes, you don't believe it
12 was a new agreement however?

13 A. I don't believe it was a new agreement.

14 Q. Okay. The Health Alliance Plan rate -- strike that.

15 The HealthPlus rate that's reflected on
16 Rodgers 3 of a 20% discount, was that affected in any
17 way by your favored pricing provision in your Blue
18 Cross contract?

19 MR. SUKENIK: Object to form.

20 MS. FITZPATRICK: Objection to the form.

21 A. No, it did not.

22 BY MR. STENERSON:

23 Q. Now counsel asked you some questions earlier about
24 whether or not the pricing provision in Blue Cross 17
25 would prevent you contractually from giving a rate

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1 within 8 points of Blue Cross; do you recall that?

2 A. I do.

3 Q. And I believe your, your answer to those series of
4 questions was yes, correct?

5 A. Make sure -- repeat it so that I'm answering it
6 correctly.

7 Q. Sure. Counsel had asked you on the other examination
8 whether or not the pricing provision in Blue Cross --
9 strike that.

10 Counsel asked you a series of questions
11 about the favored pricing provision that's contained
12 in Rodgers 17; do you recall those questions?

13 A. I do.

14 Q. And one of the series of questions was about whether
15 or not the differential in the pricing provision would
16 preclude MidMichigan from giving a rate within 8
17 points of Blue Cross's rate; do you recall that?

18 A. Yes.

19 Q. And I believe your answer to those series of questions
20 was yes, it would?

21 MS. FITZPATRICK: Objection to form.

22 BY MR. STENERSON:

23 Q. Is that your memory?

24 A. That is correct.

25 Q. Can you reconcile for us, sir, your testimony that you

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1 believe that the favored pricing provision in
2 Rodgers 17 would contractually preclude MidMichigan
3 from giving another payer a rate within 8 of Blue
4 Cross, yet in your unequivocal view that it had no
5 effect on anybody's rate?

6 MR. SUKENIK: Object to form, misstates the
7 record, mischaracterizes testimony.

8 MS. FITZPATRICK: Objection to form.

9 A. That is -- that is the case. That is correct.

10 BY MR. STENERSON:

11 Q. Can you explain that distinction?

12 A. How can I -- can I reconcile that? You know, I said
13 in the earlier questioning that really the MFN
14 provision had no effect on our managed care strategy,
15 except to the extent that it might affect Clare and
16 Gladwin.

17 Q. So your answers were really about -- you were just
18 reading the actual language of the clause in the
19 favored pricing provision when you were agreeing that
20 -- strike that. I'll withdraw.

21 Now you also mentioned in questioning from
22 counsel that there was a payer Michigan Health that
23 approached MidMichigan recently?

24 A. Yes.

25 Q. And they wanted Blue Cross rates?

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1 A. Yes.

2 Q. And the best discount you were willing to offer
3 Michigan Health was between 13 and 17% off of charges?

4 A. That's correct.

5 Q. Did your willingness to offer a discount at that
6 level, was that affected in any way by the favored
7 pricing provision that was contained in Rodgers 17?

8 A. No.

9 MS. FITZPATRICK: Objection to form.

10 BY MR. STENERSON:

11 Q. Would you, sir, give any other payer the Blue Cross
12 rate?

13 MR. SUKENIK: Object to form.

14 A. That's too hypothetical. I would assume not.

15 BY MR. STENERSON:

16 Q. Why did you not want to give Michigan Health the Blue
17 Cross rate?

18 A. We didn't want to give it to them because we couldn't
19 afford it. It just, you know -- they had to be in
20 line with who they were competing with.

21 Q. And I do notice that CIGNA is also on Rodgers 3; do
22 you see that?

23 A. Uh-huh.

24 Q. And is there any relationship between the rate
25 MidMichigan was willing to give to Aetna as compared

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1 to the rate that it was willing to agree to with
2 CIGNA?

3 MS. FITZPATRICK: Objection to form.

4 MR. SUKENIK: Object to form.

5 A. As it pertained -- the agreement with Aetna as it
6 relates to CIGNA?

7 BY MR. STENERSON:

8 Q. Yes. In other words, they're both at 20.

9 A. They're both at 20. CIGNA has a Most Favored Nation
10 provision that excludes Blue Cross.

11 Q. Oh, they do?

12 A. They do.

13 Q. How long has CIGNA had a Most Favored Nations
14 provision at MidMichigan?

15 A. I would -- I would suspect since August, 2005.

16 Q. And did you negotiate that?

17 A. I did.

18 Q. And is it -- who requested the clause to be put in the
19 contract?

20 A. They did.

21 Q. And why was it agreeable to MidMichigan?

22 A. It was, again, it was one of those things in a
23 negotiation where, you know, all the pieces have to
24 add up, and it was one that we were willing to, to
25 give them in exchange for the better term somewhere

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1 Q. Is there any reason, if there's a clause in a contract
2 that you feel strongly about, that you can't make it a
3 deal breaker?

4 MS. FITZPATRICK: Objection to form.

5 A. There is, yes.

6 BY MR. STENERSON:

7 Q. But that's what you do when it's an important
8 provision, right?

9 MS. FITZPATRICK: Objection, to form.

10 A. Correct.

11 BY MR. STENERSON:

12 Q. You can make it a deal breaker if you think it's that
13 important?

14 A. Ask United Healthcare.

15 Q. I'm correct? Did United Healthcare ask for a favored
16 pricing provision?

17 A. No. I was just saying they asked for things that we
18 just would walk away because they were unreasonable.

19 Q. But completely unrelated to any favored pricing
20 provision, correct?

21 MS. FITZPATRICK: Objection, form.

22 A. Your question was whether or not if there's a contract
23 provision that would make it worth walking away, and
24 so I'm saying yes.

25 BY MR. STENERSON:

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1 Q. In your experience -- I'm sorry, go ahead.

2 A. It wasn't pertaining to an MFN, though.

3 Q. Right, and so your experience with United is there are
4 lots of clauses over the years in negotiating with
5 them that you felt were deal breakers?

6 A. Yes.

7 Q. And that's what failed -- that was the reason that you
8 never reached final agreement with them until 2012?

9 A. That's correct.

10 Q. And had a favored pricing provision in the Blue Cross
11 agreement been such a deal breaker clause, you would
12 have negotiated to the brink to take it out?

13 MS. FITZPATRICK: Objection to form.

14 A. That's correct. Now with Blue Cross, we have a lot
15 less latitude to do that because it's much more
16 dangerous because they're such a big part of the
17 market. I don't know if I can use the word monopoly
18 but they're so huge that, you know, it's harder to
19 take them to the brink than it is United Healthcare
20 who we don't even have a contract with. So it's -- I
21 mean, there's differences because of the order of
22 magnitude, but yes, you can take something to the
23 brink. But I'll tell you, I mean, the MFN wasn't
24 important to me.

25 BY MR. STENERSON:

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1 Q. And when you were negotiating the clarification in
2 Rodgers 26, you negotiated out the increase to 10
3 points?

4 MS. FITZPATRICK: Objection to form.

5 A. We did.

6 BY MR. STENERSON:

7 Q. So now I want to go to Rodgers 27. I want to make
8 sure I understand your testimony from earlier, sir. I
9 want to direct your attention to the first sentence.
10 Now this is an email in August of 2009 that you
11 drafted, correct?

12 A. Yes.

13 Q. And you start your email: We worked through the
14 weekend and yesterday battling with Blue Cross.

15 Do you see that?

16 A. Yes.

17 Q. Last evening they countered with a formal proposal
18 that generally I am very pleased with.

19 Correct?

20 A. That's correct.

21 Q. Then you continue: They're offering basically
22 7.5 million in enhancements by reducing their discount
23 off charges by 4%.

24 Correct?

25 A. Yes.

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1 terms very quickly with them. They didn't even ask
2 for that deep of a discount, or we settled on a fairly
3 nominal discount in my mind and yet had these major
4 contract provisions that had nothing to do with how
5 much they paid us.

6 MARKED FOR IDENTIFICATION:
7 BLUE CROSS RODGERS EXHIBIT 1820
8 5:20 p.m.

9 BY MR. STENERSON:

10 Q. I've handed you what's been marked as Blue Cross
11 Exhibit 1820. It's a December 21st, 2011 email from
12 you to Mr. Reynolds and others indicating that you
13 were executing a hospital only agreement with United
14 Healthcare; is that right?

15 A. Yes.

16 Q. And you state: It isn't bad financially, 15% discount
17 and has a provision to terminate without cause with
18 120 days' notice, but generally it has the most
19 unfavorable language we have ever agreed to.

20 Do you see that?

21 A. Yes.

22 Q. What did you mean by that?

23 A. What it says.

24 Q. When you're referring to unfavorable language, what
25 are the types of clauses that are unfavorable?

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1 MS. FITZPATRICK: Objection to form.

2 A. You know, technical denials, you know, they could --
3 they could make a rule on their end and without,
4 without talking to us and we were just at their mercy.
5 The things that finally drew us together was they were
6 bidding on Dow. They wanted to have a contract with
7 us. So they gave us a few things, and then they gave
8 us the 120 days' notice without cause. So we accepted
9 more unpalatable contract provisions.

10 BY MR. STENERSON:

11 Q. In fact, you say in the next sentence: United was the
12 last major payer with whom we hadn't contracted with.

13 Do you see that?

14 A. Yes.

15 Q. Do you believe as of today, all the major payers that
16 compete in Michigan have MidMichigan in network?

17 MS. FITZPATRICK: Objection, form.

18 MR. SUKENIK: Object to form, foundation.

19 A. Yeah, pretty much.

20 BY MR. STENERSON:

21 Q. You can set that aside, sir.

22 MARKED FOR IDENTIFICATION:

23 BLUE CROSS RODGERS EXHIBIT 1821

24 5:23 p.m.

25 BY MR. STENERSON:

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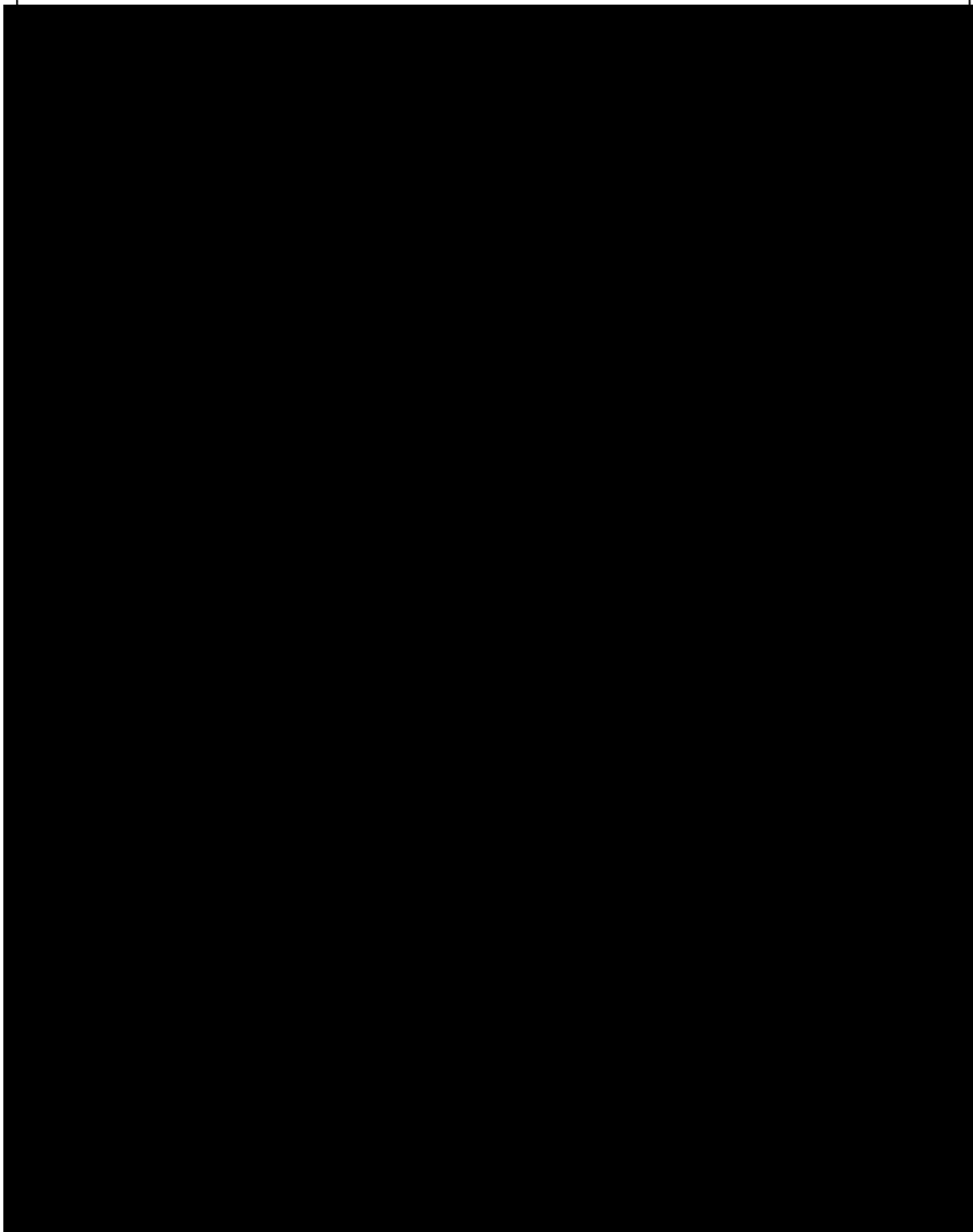


EXHIBIT 18

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. : 2:11-cv-15346-DPH-MKM
 :
 BLUE CROSS BLUE SHIELD OF :
 MICHIGAN, :
 :
 Defendant. :
 - - - - - :

Traverse City, Michigan
Thursday, March 15, 2012

Confidential Video Deposition of:

STEVEN LEACH,

was called for oral examination by counsel for
 Plaintiff, pursuant to Notice, at the Alpha Center, 3668
 North US-31, Traverse City, Michigan, before Michele E.
 French, RMR, CRR, of Capital Reporting Company, a Notary
 Public in and for the State of Michigan, beginning at
 9:52 a.m., when were present on behalf of the respective
 parties:

1 Q So would it be correct to say that Blue Cross
2 is about four times as large as Priority at your
3 hospital? **14:17:56**

4 A That's probably a true statement, yeah.

5 Q Who is number three?

6 A I don't know. United Healthcare, Cofinity. I
7 mean, you have to look on the list because they -- **14:18:12**
8 again, when you get down there, it's 4 million, 3
9 million, 2 million, and it's in that range, so I don't
10 know off the top of my head.

11 Q How many commercial health insurers would you
12 say do a significant amount of business at Munson **14:18:21**
13 Medical Center?

14 A How many? What's "significant" mean?

15 Q What does it mean to you? Would you say --

16 A I would say if it's over a million dollars,
17 maybe, in reimbursement a year. **14:18:30**

18 Q Let's use that as our benchmark. What --

19 A 20, maybe.

20 Q There are 20 commercial health insurers. What
21 if we said \$10 million? How many commercial health
22 insurers do more than \$10 million worth of business a **14:18:44**
23 year at Munson Medical Center?

24 A I think there's -- I'm going to say two. I
25 don't think anybody gets over 10 million other than

1 Priority and Blue Cross.

2 Q How does the presence of a most favored nation **14:19:03**
3 clause affect the factors that are relevant to the
4 hospital's analysis in determining a discount?

5 A It doesn't have any effect.

6 Q Why not?

7 A Because there's no payer that we're afraid of **14:19:23**
8 with regards to a most favored nation clause -- maybe
9 you should -- are you talking about the specific Blue
10 Cross most favored nation or something else?

11 Q Let's start with that. At Munson Medical?

12 A There's no impact, because there's nobody that **14:19:39**
13 has a better deal than Blue Cross currently so there
14 isn't any impact.

15 Q If someone did get a better deal than Blue
16 Cross, then what?

17 MR. STENERSON: Object to the form. **14:19:51**

18 THE WITNESS: If somebody got a better
19 deal? I mean, it's not going to happen because they'd
20 have to bring more volume than Blue Cross could bring to
21 the table.

22 If Blue Cross became a very small player **14:20:01**
23 in the marketplace and got replaced, supplanted by
24 someone else, you know, United Healthcare bought all the
25 business in Michigan, then I suppose -- I mean,

1 you're -- I don't know. It's not -- we don't have to
2 deal with it because it's not a -- it's not an issue **14:20:15**
3 that we deal with.

4 BY MR. GRINGER:

5 Q I'm going to show you what we're going to mark
6 as Government Leach Exhibit 11, multi-page document
7 beginning with the page MHC000024. It's a spreadsheet **14:20:24**
8 titled, "MMC Insurance Plans, FY 2007."

9 (Government Leach Exhibit 11 was marked.)

10 BY MR. GRINGER:

11 Q And, Mr. Leach, if I could ask you --
12 actually, it's a multi-page document. It's a **14:20:45**
13 spreadsheet and it kind of, unfortunately, you know,
14 bleeds over across multiple pages.

15 A (Reviewing Government Leach Exhibit 11.)

16 Q And, Mr. Leach, do you recognize Government
17 Exhibit 11? **14:21:14**

18 A I mean, I can see it. I...I did not have
19 anything to do with creating it, but I see it.

20 Q Do you have a sense of whether or not the
21 information that's contained in Government Leach Exhibit
22 11 is kept in the ordinary course of Munson's business? **14:21:30**

23 MR. STENERSON: Objection.

24 THE WITNESS: It's really not. We
25 don't -- we don't do this, what's here. This would be

1 MR. GRINGER: Object to form and
2 foundation. **16:40:17**

3 THE WITNESS: I have an idea of what the
4 case is about, yes.

5 BY MR. STENERSON:

6 Q What's your understanding?

7 A They believe that the provisions of a most **16:40:23**
8 favored nation clause would hinder the ability of other
9 insurers to compete actively in the marketplace.

10 Q With regard to the most favored nations clause
11 at Munson, do you believe that to be true?

12 MR. GRINGER: Object to form. Are you **16:40:45**
13 talking about Munson Medical Center or all the
14 hospitals?

15 MR. STENERSON: Munson Medical Center.

16 THE WITNESS: No, I don't believe that to
17 be true. **16:40:52**

18 BY MR. STENERSON:

19 Q If you look at Leach Number 14, which is the
20 LOU, does that contain the most favored pricing
21 provision between --

22 A Okay. This is our contract? **16:41:06**

23 Q -- Munson Medical and Blue Cross?

24 A Yeah, I know which one it is.

25 Q The first effective date of that agreement

1 that contained most favored nations pricing with Munson
2 Medical Center was July 1st, 2009; correct? **16:41:20**

3 A Hit me again with that question.

4 Q Sure. The effective date of Leach Number
5 14 --

6 A Yeah.

7 Q -- the agreement that contains the most **16:41:29**
8 favored nation provision, is July 1st, 2009; correct?

9 A Yes, sir.

10 Q How many -- how, if any -- strike that.

11 Since July 1st, 2009, has Munson Medical
12 Center been unable to reach agreement with any **16:41:49**
13 commercial payer for a reimbursement contract in any way
14 because of the most favored nations provision?

15 A No.

16 Q And since July 1st, 2009, has Munson Medical
17 Center in any way had a commercial payer leave Munson as **16:42:02**
18 a payer because of the most favored nation provision?

19 MR. GRINGER: Object to form.

20 THE WITNESS: No.

21 BY MR. STENERSON:

22 Q Has any payer terminated their contract since **16:42:12**
23 July 1st, 2009, because of the most favored nation
24 provision?

25 A No.

1 MR. GRINGER: Object to form, foundation.

2 BY MR. STENERSON: **16:42:20**

3 Q Same question with regard to Paul Oliver.

4 Has -- since the most favored nation provision has been

5 in effect at Paul Oliver, has the hospital been

6 prevented in any way from negotiating a reimbursement

7 contract with any commercial payer? **16:42:31**

8 MR. GRINGER: Object to form.

9 THE WITNESS: No.

10 BY MR. STENERSON:

11 Q And since the effective date of the most

12 favored nation provision at Paul Oliver, has any **16:42:38**

13 commercial payer terminated their reimbursement

14 agreement because of that most favored nation provision?

15 MR. GRINGER: Object to form and

16 foundation. I don't know how the witness is supposed to

17 know that. **16:42:50**

18 THE WITNESS: No.

19 BY MR. STENERSON:

20 Q If that were to happen, would you know?

21 A Which? Which would have happened?

22 Q That a commercial payer terminated their **16:42:56**

23 contractual relationship.

24 A I think I would have known that.

25 Q And also you're a person who would have known

1 if a commercial payer was unable to reach an agreement
2 because of the most favored nation provision at Paul
3 Oliver?

16:43:08

4 MR. GRINGER: Object to form and
5 foundation.

6 THE WITNESS: Yes.

7 BY MR. STENERSON:

16:43:12

8 Q Same question with regard to Kalkaska. Since
9 the effective date of the most favored nation provision
10 at Kalkaska Hospital, has any commercial payer been
11 unable to reach agreement with the hospital for a
12 contract because of the most favored nations provision?

16:43:29

13 A No.

14 MR. GRINGER: Same objection to form.

15 BY MR. STENERSON:

16 Q And since the effective date of the most
17 favored nations provision at Kalkaska, has any
18 commercial payer terminated the relationship with the
19 hospital because of the most favored nations provision?

16:43:37

20 MR. GRINGER: Object to form and
21 foundation.

22 THE WITNESS: No.

16:43:45

23 BY MR. STENERSON:

24 Q And, sir, if either of those things happened
25 at Kalkaska, would you believe that you would have heard

1 about it?

2 MR. GRINGER: Object to form, foundation. **16:43:53**

3 THE WITNESS: Yes.

4 BY MR. STENERSON:

5 Q And why do you think that you would have heard
6 if those things happened?

7 A Because I'm -- **16:43:56**

8 MR. GRINGER: Same objections.

9 THE WITNESS: Because I am the primary
10 point person with regards to contracting for these
11 entities.

12 BY MR. STENERSON: **16:44:05**

13 Q So based on what we've just discussed, then,
14 Mr. Leach, is it your opinion that the most favored
15 nations provision in Leach 14, as well as the most
16 favored nations provision in Kalkaska and the Paul
17 Oliver agreements, have not prevented any commercial **16:44:18**
18 insurer from entering into contracts in the Traverse
19 City area?

20 MR. GRINGER: Object to form, foundation,
21 and compound.

22 THE WITNESS: That would be a true **16:44:27**
23 statement.

24 BY MR. STENERSON:

25 Q And is it also then true, sir, that based on

1 Leach 14 and the most favored nations provision in the
2 Kalkaska and the Paul Oliver agreement, that it's your **16:44:35**
3 opinion that no commercial insurer has left the Traverse
4 City area because of those provisions?

5 MR. GRINGER: Object to form and
6 foundation.

7 THE WITNESS: True. **16:44:45**

8 BY MR. STENERSON:

9 Q And we're going to talk a little bit about
10 Priority, which I know you spoke to Mr. Gringer about
11 earlier, but am I correct in saying that as to Kalkaska
12 Hospital, the most favored nations provision had -- **16:44:59**
13 well, strike that.

14 With regard to Kalkaska Hospital, what,
15 if any, effect did the most favored nations provision
16 have on any payer except Priority?

17 MR. GRINGER: Object to form. **16:45:16**

18 THE WITNESS: There would be no -- no one
19 else that would be impacted by that.

20 BY MR. STENERSON:

21 Q And with regard to the most favored nation
22 provision at the Paul Oliver facility -- setting aside **16:45:25**
23 the conversation we're going to have about Priority --
24 what, if any, other commercial payer was impacted by
25 that clause?

1 MR. GRINGER: Objection to form.

2 THE WITNESS: There's no other payer that **16:45:39**
3 would be affected.

4 BY MR. STENERSON:

5 Q And what, if any, payer was impacted by the
6 most favored nation provision that's in Leach Number 14?

7 MR. GRINGER: Object to form. **16:45:47**

8 THE WITNESS: Say that again.

9 BY MR. STENERSON:

10 Q Sure.

11 A What other?

12 Q Strike that. What, if any, commercial payer **16:45:52**
13 was affected in any way by the most favored nations
14 provision that's contained in Leach 14?

15 MR. GRINGER: Object to form and
16 foundation.

17 THE WITNESS: None that I know of. **16:46:01**

18 BY MR. STENERSON:

19 Q And are you the person at Munson that would
20 know of such a fact?

21 A Yes.

22 MR. GRINGER: Object to form. **16:46:09**

23 BY MR. STENERSON:

24 Q Why?

25 A Because I'm the primary point person for

1 contracting at Munson.

2 Q Now, prior to today, have we met? **16:46:14**

3 A Have I met you?

4 Q Yes, sir.

5 A No, sir.

6 Q Prior to today, have you talked to any of the
7 other lawyers you spoke to earlier? **16:46:36**

8 MR. GRINGER: Object to form.

9 THE WITNESS: I spoke to these two
10 gentlemen next to me here.

11 BY MR. STENERSON:

12 Q Have you ever spoke to Mr. Gringer before? **16:46:42**

13 A Yes, on the telephone.

14 Q How many times?

15 A One time, I believe.

16 Q Do you recall when that was?

17 A One or two. I think it was only once. A **16:46:49**
18 couple, three, four months ago. I don't remember.

19 Q How long was the conversation?

20 A Half an hour.

21 Q And what topics did you discuss during the
22 call? **16:47:05**

23 MR. GRINGER: Object to form.

24 THE WITNESS: We discussed this basic
25 issue relative to our most favored nation provisions.

1 A Joint Venture Hospital Labs.

2 Q And did you have any conversations with **17:20:58**
3 Miss Tracy about this request?

4 A Yes, I do believe I did.

5 Q And did she tell you why they were asking for
6 this agreement?

7 A No, she didn't. There was no why to it. They **17:21:10**
8 wanted us to sign it.

9 Q And did you agree to?

10 A No.

11 Q In fact, 227 is not signed; correct?

12 A Correct. **17:21:22**

13 Q Why did you not agree to sign Blue Cross 227?

14 A It was significantly poorer reimbursement for
15 those lab services.

16 Q So this was an effort of CIGNA trying to
17 reduce the reimbursements it paid to Munson? **17:21:37**

18 MR. GRINGER: Object to form.

19 THE WITNESS: Correct.

20 BY MR. STENERSON:

21 Q And did your decision not to agree to that
22 reduction have anything at all to do with the most **17:21:48**
23 favored nations provision in the Blue Cross contract?

24 MR. GRINGER: Object to form.

25 THE WITNESS: No.

1 BY MR. STENERSON:

2 Q Why -- well, let me do it this way. Let me 17:21:58
3 show you what's been marked as 228, Blue Cross.

4 (Blue Cross Exhibit 228 was marked.)

5 BY MR. STENERSON:

6 Q Please take a look at that and let me know
7 what Blue Cross 228 is. 17:22:22

8 A (Reviewing Blue Cross Exhibit 228.)

9 Q What is Blue Cross 228?

10 A It's an e-mail from myself to Mark Hepler.

11 Q And was this --

12 A Relative to the JVHL amendment that we just 17:22:48
13 spoke of for the CIGNA contract.

14 Q And what is your concern here about the
15 "slippery slope"?

16 A I'm not interested in allowing certain
17 services to be carved out of the agreement, which is 17:23:06
18 what they're intending to do here.

19 Q Did you have any subsequent conversations with
20 Miss Tracy about this after December 16, 2010?

21 A I don't remember to have, no.

22 Q Do you know if, in fact, the reimbursements 17:23:23
23 have gone down from CIGNA?

24 A To my knowledge, no.

25 Q But, again, for purposes of this case, the

1 Blue Cross most favored nations provision had absolutely
2 no relationship to your decision to not want to discount **17:23:43**
3 to CIGNA; correct?

4 A That's --

5 MR. GRINGER: Object to form.

6 THE WITNESS: That's correct.

7 BY MR. STENERSON: **17:23:51**

8 Q What, if any, impact did the most favored
9 nations provision with Blue Cross have on your decision
10 not to give CIGNA a discount?

11 A There was --

12 MR. GRINGER: Object to form, misstates **17:24:00**
13 the record.

14 THE WITNESS: -- no impact.

15 BY MR. STENERSON:

16 Q Have you also been in some recent discussions
17 with United? **17:24:07**

18 MR. GRINGER: Object to form.

19 THE WITNESS: Yes.

20 BY MR. STENERSON:

21 Q Who do you negotiate with at United?

22 A There's two, two ladies. One's name is Pam **17:24:15**
23 Morris. I can't think of the other lady right now.

24 Q And do you -- do you know how United's
25 discount rate compares to the rate Blue Cross pays

1 Munson?

2 A Yeah. It's -- Blue Cross's discount rate is **17:24:33**
3 significantly better.

4 Q And what, if anything -- strike that.

5 What, if any, impact does Blue Cross's
6 most favored nation provision with Munson have on the
7 discount rate you accept from United? **17:24:57**

8 A It had no --

9 MR. GRINGER: Object to form.

10 THE WITNESS: -- no impact.

11 BY MR. STENERSON:

12 Q And what, if any, impact does Blue Cross's **17:25:03**
13 most favored nation provision with Munson have on the
14 discount rate you would accept from Aetna?

15 MR. GRINGER: Objection, calls for
16 speculation.

17 THE WITNESS: There would be no impact **17:25:12**
18 from my perspective.

19 BY MR. STENERSON:

20 Q You understand that Aetna has also filed a
21 lawsuit against Blue Cross Blue Shield?

22 A I understand that. **17:25:22**

23 Q And you understand that it's over the same
24 most favored nations provision?

25 A Yes.

1 Q Have you at any time changed any rate for
2 Aetna because of the most favored nations provision of **17:25:32**
3 Blue Cross?

4 A No.

5 MR. GRINGER: Object to form.

6 BY MR. STENERSON:

7 Q Is that true at Munson Healthcare -- strike **17:25:37**
8 that.

9 MR. GRINGER: Object to form.

10 BY MR. STENERSON:

11 Q Is that true at the Munson facility?

12 MR. GRINGER: Object to form. **17:25:43**

13 THE WITNESS: It's true in all of our
14 facilities.

15 BY MR. STENERSON:

16 Q So all three hospitals?

17 A Correct. **17:25:47**

18 Q Your testimony is that the Blue Cross most
19 favored nations provision at Kalkaska, Paul Oliver, and
20 Munson had zero effect on any rate paid by Aetna?

21 MR. STENERSON: Object to form.

22 THE WITNESS: By Aetna? You said Aetna; **17:26:00**
23 right?

24 BY MR. STENERSON:

25 Q Yes.

1 A Correct. That's a correct statement.

2 Q What about -- what about PPOM? **17:26:05**

3 MR. GRINGER: Object to form.

4 THE WITNESS: PPOM, same statement, no
5 impact.

6 BY MR. STENERSON:

7 Q So no Blue Cross most favored nations **17:26:12**

8 provisions at Munson affected any rate paid by PPOM; is
9 that correct?

10 A Correct. I've never heard it referred to as
11 P-POM, but....

12 Q I'm sorry, how do you -- **17:26:21**

13 A P-P-O-M --

14 Q P-P-O-M.

15 A -- is what we refer to it as.

16 Q And no most favored nations provision at
17 Kalkaska affected any rate paid by P-P-O-M? **17:26:30**

18 A Correct.

19 Q And the Blue Cross most favored nations
20 provision at Paul Oliver had no effect on any rate paid
21 by P-P-O -- P-P-O-M?

22 A Correct. **17:26:43**

23 MR. GRINGER: Object to the form.

24 (Blue Cross Exhibit 229 was marked.)

25 BY MR. STENERSON:

Capital Reporting Company
Leach, Steven 03-15-2012

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1 Q Let me hand you what's been marked as Blue

2 Cross 229. Can you identify Blue Cross 229, Mr. Leach? 17:27:00

3 A It's an agreement with P-P-O-M effective 10-1
4 of '97.

5 Q And if you could turn to Exhibit B, which is
6 Bates numbered 813. Can you identify the rate that
7 Munson Medical Center negotiated with P-P-O-M in this 17:27:48
8 exhibit?

9 A 5 percent discount on inpatient and
10 outpatient.

11 Q Okay. Do you know if that discount has
12 changed at all since 1997? 17:27:58

13 A Yeah, I think it went to [REDACTED]

14 Q And do you recognize the handwriting on the
15 upper right side of the page?

16 A No. I don't know who wrote that.

17 Q It says, "[REDACTED] effective October 1,
18 2000." Right? 17:28:18

19 A That's what it says, but I -- I think the
20 discount is [REDACTED] now.

21 Q Okay. Do you know when it went down to [REDACTED]

22 A No. I think on that database page it would 17:28:32
23 show that, though, but....

24 Q So you're referring to...?

25 MR. McCANN: Aetna 1.

Capital Reporting Company
Leach, Steven 03-15-2012

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1 BY MR. STENERSON:

2 Q Aetna 1? 17:28:53

3 A Yeah. Does it say [REDACTED] there? All
4 right. Well....

5 Q Let me ask you, do you agree with the
6 following statement: That the Blue Cross most favored
7 nations provision in the Paul Oliver contract has likely 17:29:45
8 contributed significantly to increases of as much as 100
9 percent in Paul Oliver Memorial Hospital's rates charged
10 to Priority Health?

11 A No.

12 Q Do you agree with the statement that the most 17:29:59
13 favored nations provision at Paul Oliver Memorial
14 Hospital will likely result in an increase in rates
15 charged to Aetna?

16 A No.

17 Q Do you agree with the statement that the most 17:30:14
18 favored nations provision in Kalkaska Memorial Health
19 Center's contract with Blue Cross has contributed
20 significantly to increases of as much as 90 percent in
21 Kalkaska Memorial Hospital's rates charged to Priority
22 Health? 17:30:37

23 A No.

24 Q Do you agree with the statement that the most
25 favored nations provision in Kalkaska Memorial Health

1 Center's contract with Blue Cross will likely result in
2 an increase in rates charged to Aetna? **17:30:47**

3 A No.

4 Q Do you agree with the statement that Blue
5 Cross's contract with Munson Health Center effectively
6 restricts Munson's ability to offer rival insurers rates
7 at or below those paid by Blue Cross, which in turn **17:31:08**
8 likely inhibit rival insurers' ability to enter or
9 expand and compete against Blue Cross?

10 MR. GRINGER: Objection, foundation.

11 THE WITNESS: If -- say that again. If a
12 rate were offered to them less than -- restate it, **17:31:27**
13 maybe, so I can follow it better.

14 BY MR. STENERSON:

15 Q I'll withdraw it.

16 Do you agree with the statement that the
17 most favored nations provision in the contract with **17:31:40**
18 Kalkaska Memorial requires the hospital to charge
19 greater rates than those charged to Blue Cross?

20 MR. GRINGER: Object to form.

21 THE WITNESS: I believe it's in an
22 equilibrium point, not greater. **17:32:04**

23 BY MR. STENERSON:

24 Q Same is true for Paul Oliver?

25 A Yes.

1 Q If you could turn to Leach number 5, please.

2 It's Government Leach 5. It's the July 6th, 2010, **17:32:30**
3 e-mail from Mr. Darland.

4 Do you recall the discussion earlier
5 today about potentially switching the employees'
6 healthcare at Kalkaska to Priority?

7 A Yes, that was an option. **17:32:58**

8 Q And if I -- if I understood your testimony
9 correctly, your negotiating position with Blue Cross was
10 that if you try to lower our rate, we're going to switch
11 to Priority because the hospital will get higher rates;
12 is that right? **17:33:21**

13 MR. GRINGER: Object to form.

14 THE WITNESS: Correct. So they would
15 benefit by enhanced reimbursement at Priority.

16 BY MR. STENERSON:

17 Q And then Blue Cross would lose a customer? **17:33:31**

18 A Correct.

19 Q And did that tactic work in trying to -- in
20 Blue Cross's efforts to lower its rates?

21 A No.

22 Q And at the time that that tactic didn't work, **17:33:47**
23 Blue Cross had the most favored nations provision in the
24 contract with Kalkaska; correct?

25 A Yes.

EXHIBIT 19

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

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-----:
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

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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

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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
3 services provided.

14:56:17

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

EXHIBIT 20

1 But if you've got points differentiating your 13:58:40
2 different payers, you can paying up that adjustment on
3 the back end, on your marketing side, by either making
4 people pay more out of pocket 30, 40 percent of their
5 healthcare knowing they're going to use it. So you --
6 you can make adjustments actually on all three.

7 So I'm not sure if there is one more 13:59:02
8 important than the other, but you can make the
9 adjustments in -- in the two other factors of -- say
10 you've got price, you've got your utilization factors,
11 and you've got your benefits. So you -- you can slide
12 those around interchangeably.

13 Q Is it fair to say, based on your experience, 13:59:16
14 that different payers have different strengths and
15 different factors?

16 A Oh, most definitely. 13:59:21

17 Q Does any one payer have all the strengths 13:59:22
18 and -- and none of the weaknesses?

19 MR. GRINGER: Object, foundation. 13:59:32

20 THE WITNESS: I don't believe so. 13:59:31

21 BY MR. STENERSON: 13:59:32

22 Q And -- 13:59:32

23 THE COURT REPORTER: "I don't believe so"; 13:59:33
24 was that your answer? I'm sorry.

25 THE WITNESS: Yes, I don't believe so. 13:59:33

1 BY MR. STENERSON: 13:59:33

2 Q And would you agree with me, sir, that those 13:59:33
3 varied strength and weaknesses are just part of the
4 competitive process in insurance?

5 MR. GRINGER: Object to form. 13:59:39

6 THE WITNESS: That's all part of the risk 13:59:40
7 game, yes.

8 BY MR. STENERSON: 13:59:42

9 Q And one of those factors are hospital 13:59:42
10 reimbursement contracts, correct?

11 A Yes. 13:59:48

12 Q And specifically, as it relates to Marquette, 13:59:49
13 I just want to make sure I -- I have all the payers
14 correct. I believe you said that Marquette initiated
15 conversations with Health Plus; is that right?

16 MR. GRINGER: Object to form. 14:00:09

17 THE WITNESS: We -- actually we called Health 14:00:10
18 Plus, but they did not have interest in coming up.

19 BY MR. STENERSON: 14:00:14

20 Q So they -- they -- they were invited and 14:00:14
21 didn't even --

22 A Right. 14:00:17

23 Q -- want to come? 14:00:17

24 A Right. 14:00:20

25 Q Did they tell you why? 14:00:21

1 A I -- I can't recall why they didn't want to 14:00:22
2 come up.

3 Q But you remember clearly that they did not 14:00:25
4 want to?

5 A Yes. 14:00:28

6 Q You initiated Marquette -- you, on behalf of 14:00:29
7 Marquette, initiated talks with HAP as well?

8 A Yes. 14:00:35

9 Q And how did those conclude? 14:00:36

10 MR. GRINGER: Object to form. 14:00:40

11 THE WITNESS: Really, I think -- and after, 14:00:43
12 you know, I used a document I saw earlier today --

13 BY MR. STENERSON: 14:00:49

14 Q Sure. 14:00:49

15 A -- there was that email stating that their -- 14:00:49
16 their position was they wanted Medicaid rates to be

17 competitive in that market. And anybody could be
18 competitive in that market if they got Medicaid rates.

19 And it just wasn't -- you just can't give Medicaid
20 rate -- it doesn't cover your cost at the hospital. So

21 that pretty much ended at that negotiation of -- or
22 that request of asking for Medicaid rates.

23 Q Okay. And I believe you said on behalf of 14:01:09
24 Marquette you approached Assurant?

25 A Yes. 14:01:14

1 Q And do you recall how the discussions with 14:01:14
2 Assurant concluded?

3 A We hooked up Assurant with UHPH -- or UPHP. 14:01:19
4 And Dennis Smith and Greg over there pretty much
5 handled their own negotiations. I believe they were
6 successful in getting a contract. I'm not sure what
7 the status of that contract is today.

8 Q And you said you initiated contract -- strike 14:01:35
9 that.

10 You said you also initiated contact with 14:01:38
11 Priority on behalf of Marquette?

12 A Yes. 14:01:41

13 Q And how did those discussions conclude? 14:01:42

14 MR. GRINGER: Object to form. 14:01:45

15 THE WITNESS: We -- we didn't make any 14:01:48
16 changes. I think Priority already had a current
17 contract. And again, Priority -- Priority puts some
18 pretty stiff terms out that they wanted, which
19 Marquette just couldn't meet, so we ended our
20 discussions.

21 BY MR. STENERSON: 14:02:01

22 Q Any other payers that you recall contacting? 14:02:01

23 A You know, we -- we had -- I don't -- we -- we 14:02:08
24 had decided to look at the big -- you know, the BUCAs
25 with United and -- and that. They already had

1 contracts in that market, but we didn't think we could
2 entice them in any other way to pick up more market
3 share because it's just not there. The big -- the big
4 employers just don't go to small markets like that and
5 get excited.

6 Q Did any of the -- of the big national 14:02:29
7 players -- strike that.

8 During your work at Marquette, did you ever 14:02:33
9 learn that any of the big national players were
10 actively seeking out Marquette?

11 A I did not. 14:02:40

12 Q At least as it related to HAP, did I 14:02:41
13 understand correctly that you did not have approval
14 authority on rates for negotiations with HAP?

15 A Correct. 14:02:51

16 Q And you did not have approval authority for 14:02:51
17 any negotiations with priority?

18 MR. GRINGER: Object to form. 14:02:56

19 MS. HOPKINSON: Object to the form. 14:02:57

20 BY MR. STENERSON: 14:02:58

21 Q Strike that. 14:02:58

22 Mr. Smith, did you have any approval 14:03:00
23 authority on behalf of Marquette for any of the
24 discussions with Priority?

25 MR. GRINGER: Object to form. 14:03:04

1 THE WITNESS: I had approval for discussion, 14:03:05

2 yes.

3 BY MR. STENERSON: 14:03:08

4 Q No, of -- I believe your testimony before was 14:03:08

5 that you had no signature or approval authority?

6 A Correct. 14:03:15

7 Q And -- 14:03:16

8 A Of a final -- of the final contract. I 14:03:16

9 had -- I had authority to talk to those plans.

10 Q Correct. 14:03:20

11 A Yes. 14:03:20

12 Q And so all I want to do is just go through 14:03:20

13 for each of the plans to confirm that you had neither

14 signature authority nor final rate approval authority

15 for any of them, okay?

16 A Correct. 14:03:31

17 Q So it's accurate to say that you did not have 14:03:31

18 signature authority for any agreement with Priority?

19 A Correct. 14:03:35

20 Q And you did not have signature authority on 14:03:36

21 behalf of Marquette for any agreement with HAP?

22 A Correct. 14:03:40

23 Q And you did not have signature authority on 14:03:41

24 behalf of Marquette for any agreement with Assurant?

25 A Correct. 14:03:47