

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

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

v.

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

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

Defendant.

**DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S ANSWER AND DEFENSES
TO THE COMPLAINT**

Defendant Blue Cross Blue Shield of Michigan (“Blue Cross”), by and through counsel, responds to the complaint filed by the United States of America and the State of Michigan, as follows. All allegations not specifically admitted are denied.

The unnumbered introductory statement at pages 1-2 of the complaint contains no factual allegations and therefore no response is required. To the extent a response is required, Blue Cross denies any allegations in the introductory statement.

1. Responding to Paragraph 1, Blue Cross admits that it had revenues in excess of \$10 billion in 2009. Blue Cross denies that its “health insurance policies cover more than three million Michigan residents.” The remaining allegations, including allegations concerning market power and whether Blue Cross competes with other insurers, are legal conclusions that require no answer. To the extent an answer is required, Blue Cross denies these allegations.

2. Responding to Paragraph 2, Blue Cross admits that it paid more than \$4 billion on behalf of Blue Cross Members to hospitals in 2007 as reimbursement for health care provided to Blue Cross members and that it has paid reimbursements to all hospitals in the State of Michigan at

some time in the last five years. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this Paragraph at this time and therefore denies these allegations.

3. Responding to Paragraph 3, Blue Cross states that the terms of its contracts with hospitals speak for themselves. Further responding, Blue Cross asserts that the word “many” is vague and Blue Cross therefore denies the allegation in the first sentence of this Paragraph. With respect to the third sentence, Blue Cross lacks sufficient knowledge to admit or deny the portion of acute care beds covered by the 70 hospitals to which DOJ is referring and therefore denies the allegation. In addition, the term “or similar clauses” is vague and incomprehensible. Blue Cross denies the remaining allegation in the Paragraph.

4. Responding to Paragraph 4, including its subparts, Blue Cross states that the terms of its contracts with hospitals speak for themselves. Blue Cross denies the remaining allegations of Paragraph 4, including its subparts.

5. Blue Cross denies the allegations in Paragraph 5.

6. Blue Cross denies the allegations in Paragraph 6, and further states that it lacks information or knowledge sufficient to form a belief as to the truth of the allegations as to what hospitals have done and therefore denies those allegations for that reason.

7. Blue Cross denies the allegation in Paragraph 7 that it acts through its subsidiaries, which are independent corporations not named in the complaint. Blue Cross admits the remaining allegations in Paragraph 7.

8. Blue Cross admits that Plaintiffs purport to bring an action under the named statutes. Blue Cross denies that it violated any of these statutes or that Plaintiffs are entitled to any relief.

9. Responding to Paragraph 9, Blue Cross admits that it contracts with the State of Michigan. Blue Cross denies that the State of Michigan has been injured, or is likely to be injured, by any conduct undertaken by Blue Cross. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this Paragraph and therefore denies these allegations.

10. Paragraph 10 contains legal conclusions to which no response is required.

11. Responding to Paragraph 11, Blue Cross admits that some of its products cover Blue Cross members when they travel out of Michigan. Blue Cross denies the allegation that increased prices for hospital services are caused by Blue Cross's MFNs. The remaining allegations state legal conclusions to which no response is required.

12. Responding to Paragraph 12, Blue Cross admits that it maintains its principal place of business and transacts business in Detroit, Michigan. Blue Cross denies the remaining factual allegations in Paragraph 12 and further states that the allegations concerning venue and personal jurisdiction are legal conclusions to which no response is required.

13. Blue Cross denies that it is a "commercial insurance company" and therefore denies the allegations in the first sentence of Paragraph 13. Blue Cross admits that many employed individuals obtain health insurance through their employers, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this Paragraph and therefore denies these allegations.

14. Responding to Paragraph 14, Blue Cross admits that "commercial health insurers" compete in numerous ways and that employees often have multiple health insurance plans from which to choose. Blue Cross denies all other allegations in Paragraph 14.

15. Responding to Paragraph 15, Blue Cross admits that it received more than \$750 million in ASO fees in 2009. Blue Cross admits that “fully insured” and “self insured” plans, as described in the complaint, are methods used to provide group health plans. Blue Cross further admits that it processed nearly \$11 billion in health care claims for self-insured employers in 2009.

16. Responding to Paragraph 16, Blue Cross asserts that the allegations about what “most” plans provide and what is “typical” are overly general and vague and therefore Blue Cross denies these allegations.

17. Blue Cross admits the allegation in Paragraph 17 that hospital pricing often reflects a negotiated discount off of a hospital’s list price. Blue Cross states that its contracts with hospitals speak for themselves. The remaining allegation about what is “typical” is overly general and vague, and Blue Cross therefore denies the allegation.

18. Blue Cross denies the allegations in the first and fourth sentence of Paragraph 18. The second and third sentences contain legal conclusions to which no response is required. Responding to the fifth sentence, Blue Cross states that any statements by Blue Cross speak for themselves and must be considered in context. Blue Cross lacks knowledge or information sufficient to form a belief as to the truth of the final two sentences of this Paragraph and therefore denies those allegations.

19. Blue Cross admits that Plaintiffs attempt to define “commercial health insurance” in the manner described in Paragraph 19, but denies that this is an appropriate definition. Blue Cross denies all other allegations in Paragraph 19.

20. Responding to Paragraph 20, Blue Cross states that the first sentence contains legal conclusions to which no answer is required. As to the second sentence, Blue Cross admits that a

variety of factors are important to those choosing health insurance. Blue Cross is without information or knowledge sufficient to form a belief as to the truth of the allegations as to what “most” employers and insureds consider important, and therefore denies the allegations in the third sentence.

21. Blue Cross denies the allegations in Paragraph 21.

22. The first sentence of Paragraph 22 contains legal conclusions to which no answer is required. Blue Cross admits that some Michigan residents purchase individual health insurance. Blue Cross denies all other allegations in Paragraph 22.

23. The allegations in Paragraph 23 are overly general and vague and Blue Cross therefore denies these allegations.

24. Blue Cross states that its contracts with hospitals speak for themselves and denies all other allegations in Paragraph 24.

25. The first sentence of Paragraph 25 states a legal conclusion to which no response is required. The remaining sentences are overly general and vague, and Blue Cross therefore denies these allegations.

26. Paragraph 26 states legal conclusions to which no response is required. To the extent a response is required, Blue Cross denies the allegations in Paragraph 26.

27. Blue Cross admits the allegation in Paragraph 27 that MSAs and Micropolitan Statistical Areas are geographic areas defined by the U.S. Office of Management and Budget, but denies that they can appropriately be used to define antitrust markets. The remainder of Paragraph 27 states legal conclusions to which no response is required. To the extent a response is required, Blue Cross denies the allegations in Paragraph 27.

28. Paragraph 28, including its subparts, states legal conclusions to which no response is required. To the extent a response is required, Blue Cross denies the allegations in Paragraph 28.

29. Responding to Paragraph 29, Blue Cross states that Plaintiffs have failed to define appropriately any geographic markets and that Blue Cross's contracts with hospitals speak for themselves.

30. Responding to Paragraph 30, Blue Cross states that the first sentence is incomprehensible and that Plaintiffs have failed to define appropriately any geographic market, and therefore denies the allegations in that sentence. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the remaining sentences, and therefore denies those allegations.

31. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the first and second sentences of Paragraph 31, and therefore denies those allegations. The third and fourth sentences state legal conclusions to which no response is required. Blue Cross admits the allegations in the fifth sentence that some health insurers offer HMO products and that some number of Michigan insureds participate in HMOs, but denies the remaining allegations.

32. Blue Cross states that the allegations in Paragraph 32 are legal conclusions to which no response is required. To the extent a response is required, Blue Cross denies the allegations and, in particular, denies that any Blue Cross practice negatively impacted anyone in any properly defined antitrust market.

33. Blue Cross states that the first and third sentences of Paragraph 33 are legal conclusions to which no response is required. Blue Cross denies the allegations in the second sentence of this

Paragraph, and, to the extent a response is required, denies the allegations in the other sentences as well.

34. Paragraph 34 states a legal conclusion to which no response is required. To the extent a response is required, Blue Cross denies the allegations in Paragraph 34.

35. Blue Cross denies the allegations in Paragraph 35.

36. Responding to Paragraph 36, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross denies all other allegations in Paragraph 36.

37. Responding to Paragraph 37, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross denies all other allegations in Paragraph 37.

38. Responding to Paragraph 38, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 38, and therefore denies those allegations.

39. Responding to Paragraph 39, including its subparts, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross denies all other allegations in Paragraph 39.

40. Responding to Paragraph 40, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross denies all other allegations in Paragraph 40.

41. Blue Cross denies the allegations in Paragraph 41, including its subparts.

42. Responding to the first sentence of Paragraph 42, Blue Cross states that the term “substantial” is too vague to allow for a meaningful response and therefore denies the allegations in that sentence. Responding to the second sentence, Blue Cross admits that, as the Michigan Legislature specifically intended, Blue Cross often seeks, and believes it sometimes receives, better discounts for hospital services than at least some commercial health insurers. House Bill 4555 Second Analysis, 1, 7 (Feb. 19, 1981); *Blue Cross & Blue Shield of Mich. v. Milliken*, 422

Mich. 1, 41 (1985). Also, as the legislature specifically intended, when Blue Cross is able to obtain discounts from facilities that assist in providing it a hospital cost advantage as compared to commercial insurers, that advantage may help provide Blue Cross the ability to compete successfully against commercial insurers while fulfilling its statutory mission. *Id.* Otherwise this allegation is denied. Responding to the remaining sentences, Blue Cross states that any statements made by Blue Cross speak for themselves and must be addressed in context. Blue Cross denies all other allegations in this Paragraph.

43. Blue Cross denies the allegations in Paragraph 43, and further states that any statements made by Blue Cross speak for themselves and must be addressed in context.

44. Blue Cross denies the allegations in Paragraph 44, and further states that the terms of Blue Cross's contracts with hospitals speak for themselves.

45. Blue Cross denies the allegations in the first and last sentences of Paragraph 45. Blue Cross further states that because the remaining allegations are based on vague assertions that certain things are "significant" or "typical," the allegations are too vague to allow Blue Cross to respond, and Blue Cross therefore denies these allegations.

46. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 46 and therefore denies those allegations.

47. Responding to the first five sentences of Paragraph 47, Blue Cross states that the terms of its contracts with hospitals speak for themselves. Blue Cross denies the allegations in the last sentence.

48. Blue Cross denies the allegations in Paragraph 48.

49. Blue Cross denies the allegations in Paragraph 49 and states that its contracts with hospitals speak for themselves.

50. Responding to Paragraph 50, Blue Cross states that the term “by far” renders the allegations in the first sentence vague, and therefore denies those allegations. Responding to the second and third sentences, Blue Cross states that any statements made by Blue Cross speak for themselves and must be addressed in context.

51. Blue Cross admits that, to the best of its knowledge, Marquette General is a 315 bed tertiary care hospital in the Upper Peninsula and the nearest tertiary care hospital appears to be in Wisconsin. Blue Cross states that the term “more complex surgeries” is too vague to allow for a response, and Blue Cross therefore denies the related allegation.

52. Blue Cross denies the allegations in Paragraph 52.

53. Blue Cross admits the allegation in Paragraph 53 that there are many hospitals in the Upper Peninsula and that at least 11 are Peer Group 5 hospitals. Blue Cross further states that its contracts with hospitals speak for themselves. Blue Cross is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations, and therefore denies these allegations.

54. Responding to the first sentence of Paragraph 54, Blue Cross states that its contracts with hospitals speaks for themselves. Blue Cross denies the remaining allegations of this Paragraph, except Blue Cross admits that OSF St. Francis is not a tertiary care hospital and states that it is without information or knowledge sufficient to form a belief as to what “insurers” would or would not do.

55. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 55, and therefore denies those allegations.

56. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 56, and therefore denies those allegations.

57. Responding to Paragraph 57, Blue Cross admits that it is aware that hospitals enter into contracts with numerous commercial health insurers. Blue Cross denies all other allegations in Paragraph 57 and further states that any Blue Cross statements speak for themselves and must be considered in context.

58. Blue Cross denies the allegations in Paragraph 58.

59. Responding to the first sentence of Paragraph 59, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross denies the allegations in the second sentence of Paragraph 59 and further states that Plaintiffs have failed to define appropriate antitrust markets.

60. Blue Cross admits the allegation in Paragraph 60 that it has entered into an agreement with Sparrow Hospital and states that the terms of that contract speak for themselves. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegation in the last sentence, and therefore denies that allegation.

61. Blue Cross admits the allegation in the first sentence of Paragraph 61 that Sparrow Hospital and IRMC are tertiary care hospitals. Blue Cross further states that the reference to the “Lansing area” is vague and undefined, and therefore denies the remaining allegations in that sentence. Blue Cross states that the second sentence is too vague and general to be meaningful, and therefore denies the allegations in that sentence. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the third and fourth sentences, and therefore denies those allegations. Blue Cross denies the allegations in the last sentence of Paragraph 61.

62. Responding to the first sentence of Paragraph 62, Blue Cross states that the phrase “by far” renders it vague, and Blue Cross therefore denies the allegations in that sentence. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations

in the second and third sentences, and therefore denies those allegations, except that Blue Cross admits the allegations concerning the ownership of the various health plans.

63. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the first and second sentences of Paragraph 63, and therefore denies those allegations. Blue Cross denies the allegations in the third sentence of Paragraph 63.

64. Responding to the first sentence of Paragraph 64, Blue Cross states that the terms of its contract with Sparrow speak for themselves. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the second sentence and therefore denies those allegations. Blue Cross denies the remaining allegations in Paragraph 64.

65. Blue Cross admits the allegation in Paragraph 65 that it contracts with the named hospitals and states that the terms of its contracts with those hospitals speak for themselves. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the second sentence and therefore denies those allegations. Blue Cross denies the remaining allegations in Paragraph 65.

66. Blue Cross denies the allegations in Paragraph 66.

67. Responding to Paragraph 67, Blue Cross admits that Alpena Regional Medical Center is a tertiary care hospital and the nearest tertiary care hospital appears to be in Petoskey. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third, fourth, and fifth sentences, and therefore denies the allegations. Blue Cross denies the remaining allegation in this Paragraph.

68. Responding to Paragraph 68, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross further states that any statements by Blue Cross speak for themselves and must be considered in context.

69. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 69 and therefore denies these allegations. Blue Cross denies the allegations in the second sentence of this Paragraph.

70. Blue Cross admits that Munson Healthcare owns the three hospitals listed in the first sentence of Paragraph 70. Blue Cross further admits that Munson Medical Center is a tertiary care hospital and the other hospitals listed in the second sentence are not, and that the closest tertiary care hospital appears to be in Petoskey. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this Paragraph and therefore denies those allegations.

71. Responding to Paragraph 71, Blue Cross states that its contracts with hospitals speak for themselves. Blue Cross denies all other allegations in this Paragraph.

72. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the allegations in first two sentences of Paragraph 72 and therefore denies these allegations. Blue Cross denies the remaining allegations in this Paragraph.

73. Responding to Paragraph 73, Blue Cross admits that these hospitals are classified as Peer Group Five hospitals, and that they are within the three Thumb Counties named by DOJ. Blue Cross denies the remaining allegations in this Paragraph.

74. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 74 in the first sentence and therefore denies these allegations. Blue Cross denies the second sentence of this Paragraph.

75. Responding to Paragraph 75, Blue Cross states that its contracts with hospitals (including the PHA, which is reviewed by OFIR) speak for themselves. Blue Cross further states that any statements by Blue Cross speak for themselves and must be considered in context. Blue Cross is

without knowledge or information sufficient to form a belief as to the truth of the allegation in the third sentence and therefore denies that allegation. Blue Cross denies the remaining allegations in this Paragraph.

76. Responding to Paragraph 76, Blue Cross states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentences of this Paragraph. Blue Cross denies the remaining allegations in this Paragraph.

77. Responding to Paragraph 77, Blue Cross admits that Peer Group 5 hospitals are permitted to participate in the PHA, which is reviewed and approved by OFIR. Blue Cross further states that its contracts with hospitals (including the PHA) speak for themselves. Blue Cross is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 77, including its subparts, and therefore denies these allegations.

78. Blue Cross lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 78 and therefore denies these allegations.

79. Blue Cross denies the allegations in Paragraph 79.

80. Blue Cross incorporates its responses to Paragraphs 41-79. Blue Cross denies the allegations in Paragraph 80.

81. Blue Cross denies the allegations in Paragraph 81.

82. Blue Cross denies the allegations in Paragraph 82.

83. Responding to Paragraph 83, Blue Cross repeats its responses to the allegations of Paragraphs 1 through 82 above.

84. Blue Cross denies the allegations in Paragraph 84.

85. Paragraph 85 states a legal conclusion as to which no response is required.

86. Blue Cross denies the allegations in Paragraph 86, including its subparts.

87. Blue Cross denies the allegations in Paragraph 87 and further states that its contracts with hospitals do not have anticompetitive effects in any properly defined antitrust market.

88. Paragraph 88 states a legal conclusion to which no response is required. Blue Cross denies that its agreements with hospitals unreasonably restrain trade in any properly defined antitrust market.

89. Responding to Paragraph 89, Blue Cross repeats and realleges its responses to the allegations of Paragraphs 1 through 88 above.

90. Paragraph 90 states a legal conclusion to which no response is required. Blue Cross denies that its agreements with hospitals unreasonably restrain trade in any properly defined antitrust market.

Response to Prayer for Relief. Blue Cross states that no relief is warranted in this case. Blue Cross further believes that the relief sought is overbroad and exceeds the injunctive relief that would be available to Plaintiffs.

FIRST DEFENSE

The Plaintiffs' claims are barred, in whole or in part, by the equitable doctrine of laches.

SECOND DEFENSE

The complaint fails to state a claim against Blue Cross upon which relief can be granted.

THIRD DEFENSE

The Plaintiffs' claims are barred, in whole or in part, because any action taken by or on behalf of Blue Cross was justified, constituted bona fide business competition, and was taken in pursuit of its legitimate business interests, and therefore is privileged.

FOURTH DEFENSE

The Plaintiffs' claims are barred, in whole or in part, because the procompetitive effects of Blue Cross's contracts with hospitals outweigh any potential anticompetitive effects.

FIFTH DEFENSE

The Plaintiffs' claims are barred, in whole or in part, because there has been no injury to competition.

SIXTH DEFENSE

The Plaintiffs' claims and suit are barred by state action immunity.

SEVENTH DEFENSE

The Plaintiffs' claims are barred because of governmental compulsion.

EIGHTH DEFENSE

The Plaintiffs' claims are barred, in whole or in part, under the doctrine of unclean hands.

NINTH DEFENSE

The Plaintiffs' claims are barred because this case impermissibly infringes upon the regulatory jurisdiction of OFIR under theories such as primary jurisdiction and implied exemption.

TENTH DEFENSE

The Plaintiffs' claims are barred by the McCarran-Ferguson Act.

ELEVENTH DEFENSE

The conduct alleged by Plaintiffs did not have the requisite effect on interstate commerce.

TWELFTH DEFENSE

The conduct at issue is not an anticompetitive restraint on trade.

THIRTEENTH DEFENSE

The Court should abstain from hearing this case under the doctrine of *Burford* abstention.

FOURTEENTH DEFENSE

The Court cannot grant the equitable relief sought in this case without impermissibly invalidating P.A. 350. The relief DOJ seeks is fundamentally inconsistent with Michigan's goals of universal coverage and its establishment of an insurer of last resort. Granting the requested injunction

would require the Court to substitute its judgment for the judgment of the Michigan legislature that universal coverage was more important than unfettered competition.

FIFTEENTH DEFENSE

The Plaintiffs' claims are barred by MCL § 445.774(4).

SIXTEENTH DEFENSE

The Plaintiffs' claims are barred by MCL § 445.774(5).

SEVENTEENTH DEFENSE

The Plaintiffs' claims are barred by MCL § 445.774(6).

EIGHTEENTH DEFENSE

Plaintiffs' attempt to state their 34 separate claims as a single claim is in violation of Federal Rule of Civil Procedure 10(b). Plaintiffs may not treat separate claims as a single claim; instead, they must prove each element of each claim separately.

NINETEENTH DEFENSE

Some or all of Plaintiffs' claims are preempted by ERISA.

BLUE CROSS'S PRAYER FOR RELIEF

WHEREFORE, Blue Cross denies that the Plaintiffs are entitled to any of the relief sought in the complaint or to any relief whatsoever against Blue Cross by virtue of this complaint, and Blue Cross prays for judgment as follows:

- A. That the Plaintiffs' complaint be dismissed with prejudice;
- B. That judgment be entered in favor of Blue Cross as to all causes of action asserted against them;
- C. That the Court award Blue Cross a reasonable attorney's fee pursuant to 15 U.S.C. § 15(d)(2) and any other relevant provisions;
- D. That Blue Cross be granted such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Todd Stenerson
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury that he served a copy of the foregoing Answer on September 12, 2011 on all counsel of record in accordance with this Court's policies and procedures for service of electronically filed documents.

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