

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 03-21296-CIV-MORENO-KLEIN

RICK LOVE, M.D., et al.,

Plaintiffs,

v.

THE BLUE CROSS AND BLUE SHIELD ASSOCIATION, et al.,

Defendants.

EXHIBIT O (BCBSA)
AGREED TERMS OF
POTENTIAL DISCOVERY FROM BCBSA

Notwithstanding the provisions of section 14.1 of the Settlement Agreement, the plaintiffs shall be permitted to take discovery of BCBSA as provided in this Exhibit O and nothing in this Exhibit shall be construed to prevent the plaintiffs from obtaining discovery from any defendant(s) that have not settled.

I. TERMS

1. **Method of obtaining discovery from BCBSA.** To take any permitted discovery (including documents, data, and deposition), the plaintiffs shall serve a subpoena on BCBSA in a manner consistent with the Federal Rules of Civil Procedure. The plaintiffs may seek discovery solely to the extent provided in this Exhibit O and any discovery requests shall be in substantially the same form as the corresponding provisions of this Exhibit O. BCBSA shall not seek to quash the subpoena, on the condition that the subpoena is properly served and the subpoena comports with and does not exceed the terms of the parties' agreement embodied in this Exhibit O.
2. **Relevant period.** Unless otherwise indicated, the period for discovery from BCBSA is May 22, 1999, to the end date for the class period certified by the Court.
3. **Cost and expense.** BCBSA shall bear its own costs and expenses, including attorneys' fees, associated with providing permitted discovery under this Agreement, provided that the plaintiffs shall reimburse BCBSA for costs and expenses excluding attorneys' fees exceeding \$175,000 invoiced by third party vendors for: (i) the search

for, review of, and production of electronically-stored mail or data; and (ii) copying, scanning, bates-numbering, electronically formatting, redacting, labeling, and related tasks associated with the search for, review of, and production of non-electronically stored documents (i.e., hard copies).

4. Scope of and timing of production from BCBSA.

- a. *Subject matters.* The subject matters on which BCBSA shall provide discovery from any source described below in this Exhibit O are limited to claims processing and provider contracting, including concerted activity among defendants in the Action that relates to claims processing and provider contracting.
- b. *Nature of documents required to be produced.* With respect to non-data discovery, BCBSA shall search for and produce responsive documents from the relevant period that are contained in the readily accessible central files and readily accessible paper files of the core employees most likely to have responsive documents in their files. In addition:
 - (1) With respect to documents relating to BCBSA committees or workgroups under paragraph III.A.1 below, BCBSA's obligation to search and produce documents shall be limited to searching and producing readily accessible paper documents from the individual(s) at BCBSA principally responsible for staffing or interacting with the particular committee or workgroup, such as the individual (if any) who maintains the central file for a particular BCBSA committee or workgroup.
 - (2) With respect to documents related to communications with certain third parties under paragraph III.A.4 below, BCBSA's obligation to search and produce documents shall be limited to searching and producing readily accessible paper documents from the individual(s) at BCBSA principally responsible for interfacing with the third parties identified below or, instead, most likely to possess materials regarding the interface between these third parties and the defendants.
- c. *Additional documents from core employees.* Upon a showing of special need or hardship and satisfying the standard set forth in subparagraph I.4.g below, the plaintiffs may request that BCBSA conduct a specific search for and produce the paper files from the offices of up to a maximum of 3 additional current officers or employees of BCBSA, in the aggregate, on subjects responsive to paragraphs III(A)(1), III(A)(2), or III(A)(4) below.
- d. *Obligations regarding email.* Except as provided in this subparagraph and section III.B below with respect to data discovery, BCBSA shall have no obligation to search for or produce claims data, any other forms of data, any electronic documents, or any electronically-stored emails. Upon a showing of special need

or hardship and satisfying the standard set forth in subparagraph I.4.g below, the plaintiffs may request that BCBSA conduct a specific search for and produce electronically-stored email of a limited number of current or former officers or employees of BCBSA, on subjects responsive to paragraphs III(A)(1), III(A)(2), or III(A)(4) below. If the plaintiffs seek email, BCBSA and the plaintiffs shall meet and confer regarding the scope of any search and production of emails, including for the purpose of negotiating the selection and definition of any search terms and the number and identity of any custodians, and the number and scope of search terms and custodians shall be narrowly tailored and shall not subject BCBSA to undue burden or hardship. BCBSA's obligations to search for and produce emails shall be limited to live emails on the exchange server(s) of BCBSA at the time of the search and the relevant period for any emails that BCBSA is obligated to search for and produce is May 22, 1999 to the Preliminary Approval Date. Email that relates solely to matters between BCBSA and a defendant that has settled need not be searched for or produced.

- e. *BCBSA files only.* BCBSA shall be obligated to search for and produce only discovery from BCBSA files on its premises. BCBSA shall have no obligation to search for or produce discovery in the possession, custody, or control of any of its licensees or their Affiliates.
- f. *Privilege and similar protections.* BCBSA shall not be obligated to provide information subject to the attorney-client privilege, work product doctrine, the joint defense or common interest privilege, or any other applicable privileges or doctrines that may shield information from discovery. If a log of documents withheld under this paragraph is required, it will be provided according to the terms and conditions for a privilege log as set forth in the June 14, 2004 Joint Case Management Order Setting Discovery Plan in this Action.
- g. *Timing of data and document discovery from BCBSA.* The plaintiffs shall not be permitted to seek any discovery unless and until: (i) merits discovery is proceeding in the Action, as stated by explicit order of the Court; and (ii) the plaintiffs have attempted to obtain from defendants that have not settled the discovery they seek from BCBSA, the plaintiffs have been unable to obtain such discovery from those defendants, and the plaintiffs have reasonably concluded that they cannot obtain the discovery they seek from defendants that have not settled. BCBSA may require that the plaintiffs meet and confer with BCBSA on any discovery requests the plaintiffs issue under this Exhibit O, to narrow such requests as BCBSA believes may be appropriate for the Action as it stands at the time of the requests and to verify that the plaintiffs have complied with the terms set forth in this Exhibit O.
- h. *Timing of deposition of BCBSA.* The plaintiffs shall not be permitted to call BCBSA for deposition unless and until: (i) merits discovery is proceeding in the Action, as stated by explicit order of the Court; and (ii) the plaintiffs have attempted to seek the information from defendants that have not settled or their

witnesses that they would seek to obtain by deposition from BCBSA, the plaintiffs have been unable to obtain such information from those defendants, and the plaintiffs have reasonably concluded that they cannot obtain the information they seek from defendants that have not settled. BCBSA may require that the plaintiffs meet and confer with BCBSA on any request by the plaintiffs to take BCBSA's deposition, to narrow the scope of the deposition as BCBSA believes may be appropriate for the Action as it stands at the time of the request and to verify that the plaintiffs have complied with the terms set forth in this Exhibit O.

5. **Document preservation.** BCBSA shall maintain documents for the Action consistent with the terms provided by the Court's April 27, 2006 Agreed Order for Preservation of Records in the Action for a period ending at the close of document discovery in the Action as set by the Court in its initial scheduling order relating to and explicitly permitting merits discovery, or as otherwise agreed to by the plaintiffs and BCBSA.
6. **Confidentiality.** The Court's December 9, 2004 Protective Order Governing Protected Material Other Than Confidential Health Information shall apply to any discovery from BCBSA.
7. **Use of materials.** The plaintiffs shall not use any discovery provided under this Exhibit O for any purpose except for purposes of litigating their complaint in this Action against defendants that have not settled.
8. **Format of production.** BCBSA will produce documents in the scanned and imaged format the parties agreed upon in connection with the October 2004 class certification production.
9. **Jurisdiction of court to enforce or resolve disputes.** Disputes over compliance with a subpoena issued pursuant to paragraph I.1, or enforcement of the terms, of this Exhibit O shall be determined by the Court.

II. DEFINITIONS

1. **"Action"** means *Love, et al. v. BCBSA, et al.* 03-21296-CIV-MORENO (previously captioned "*Thomas et al. v. BCBSA*").
2. **"BCBSA"** means the Blue Cross and Blue Shield Association.
3. **"BCBSA committee or workgroup"** means a board, committee, workgroup, task force, ad hoc group, or other analogous group staffed by BCBSA and consisting of representatives from one or more of the defendants.
4. **"BlueCard"** means the BlueCard® Program of BCBSA.
5. **"Consortium"** means Consortium Health Plans, Inc.

6. **“Court”** means the court adjudicating the Action.
7. **“CPT”** has the same meaning as in the Settlement Agreement.
8. **“Data”** means electronic information showing claim line information, including CPT codes, for BlueCard claims submitted by physicians to Blue Cross and Blue Shield health plans.
9. **“Defendants”** shall refer to any of the other named defendants (*i.e.*, except BCBSA) in the Action as of the Preliminary Approval Date.
10. **“Document”** means materials consistent with Federal Rules of Civil Procedure 34 and 45, except as otherwise provided herein.
11. **“McKesson”** means McKesson Corporation.
12. **“NASCO”** means National Accounts Service Company LLC.
13. **“Officers or employees of BCBSA”** refers to officers or employees of BCBSA itself. Officers or employees of Plans serving functions with BCBSA, such as by leadership or membership on a BCBSA committee or workgroup, shall not be deemed officers or employees of BCBSA.
14. **“Plaintiffs”** means the named plaintiffs in the Action and any other person acting on their behalf including, but not limited to, their partners, fellow shareholders, employees, agents, and attorneys.
15. **“Preliminary Approval Date”** means the Preliminary Approval Date for the Settlement Agreement.
16. **“Representative Plaintiffs”** has the same meaning as in the Settlement Agreement.
17. **“Settlement Agreement”** means the settlement agreement submitted to the Court by the plaintiffs, BCBSA, and others of which this Exhibit O is a part. Any capitalized terms in this Exhibit shall have the same meaning as in the Settlement Agreement.
18. **“Submission Formats”** has the same meaning as in BlueCard.

III. DISCOVERY REQUESTS

Subject to the terms and definitions above, BCBSA shall provide responsive discovery as follows:

A. DOCUMENTS

1. Minutes, agendas, and meeting materials distributed to attendees of the following BCBSA committees and workgroups:

- a. Board of Directors
 - b. Member Plans
 - c. Executive Committee of the BCBSA Board of Directors
 - d. Plan Performance and Financial Standards Committee
 - e. Inter-Plan Programs Committee
 - f. Inter-Plan Operations Committee
 - g. Emerging Issues Committee
 - h. National Council of Physician Executives
 - i. National Council on Medical Management
 - j. BlueCard Oversight Group
 - k. National Business Advisory Council
 - l. National Account Executive Committee
 - m. BlueCard Business and Operations Workgroup
 - n. BlueCard Program Executives
 - o. BlueCard Performance Workgroup
 - p. Adjustment and Inquiry Design Workgroup
 - q. Blue Strategy Group on Trizetto
2. Documents from BCBSA's Office of Clinical Affairs relating to its efforts to address providers' concerns regarding coding issues and outreach to medical associations and provider groups regarding provider contracting and claims editing, including without limitation the so-called "Plan Focus Group on Code Bundling Software."
3. The following materials:
- a. The Blue Cross and Blue Shield License Agreements
 - b. The Blue Cross and Blue Shield Controlled Affiliate License Agreements
 - c. BCBSA's Membership Standards Applicable to Regular Members
 - d. BCBSA's Guidelines to Membership Standards Applicable to Regular Members
 - e. BCBSA's Brand Book
 - f. BCBSA's BlueCard Program Manual (including documents sufficient to show changes made during the relevant class period)
 - g. BCBSA's National Account Program Manual (including documents sufficient to show changes made during the relevant class period)
4. Communications or documents describing communications between BCBSA and the following entities:
- a. NASCO
 - b. Consortium
 - c. McKesson

B. DATA DISCOVERY

The plaintiffs may seek data discovery from BCBSA in the form of Submission Formats used in actual BlueCard claims showing claim line information, and BCBSA shall produce such data to the extent it possesses it.

C. DEPOSITIONS

1. The plaintiffs may take a deposition of BCBSA pursuant to Federal Rule of Civil Procedure 30(b)(6) on the subjects of discovery permitted from BCBSA pursuant to this Exhibit O.
2. The plaintiffs' deposition of BCBSA may not exceed eight hours, of which six hours shall be reserved for the plaintiffs, one hour for any non-settling defendants, and one hour for BCBSA. If the plaintiffs believe, after taking the deposition of BCBSA, that they need a second eight hour segment for the Rule 30(b)(6) deposition, BCBSA will meet and confer with the plaintiffs concerning the requested second segment. If BCBSA declines the plaintiffs' request, the plaintiffs may raise the matter with the Court and the Court will decide whether to permit a second segment. Any second segment must be consistent with all terms otherwise set forth in this Exhibit O.
3. BCBSA obligations under this section shall be satisfied by producing witnesses who are current officers or employees of BCBSA.