

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

HEALTH ALLIANCE PLAN OF	)	
MICHIGAN, HAP PREFERRED,	)	
INCORPORATED, and ALLIANCE	)	
HEALTH AND LIFE INSURANCE	)	Civil Action No. 2:14-cv-13788
COMPANY,	)	
	)	Judge: Hon. Lawrence P. Zatkoff
Plaintiffs,	)	
	)	Magistrate Judge: Hon. Michael
vs.	)	J. Hluchaniuk
	)	
BLUE CROSS BLUE SHIELD OF	)	
MICHIGAN, a Michigan nonprofit	)	
mutual insurance company,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT’S MOTION FOR DISQUALIFICATION
OF ATTORNEY DAVID ETTINGER AND
HONIGMAN MILLER SCHWARTZ AND COHN, LLP**

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Defendant Blue Cross Blue Shield of Michigan (“BCBSM”), by its undersigned counsel of record, submits this Motion for Disqualification of Attorney David Ettinger and Honigman Miller Schwartz and Cohn, LLP, (“Honigman”) based upon an irreconcilable conflict of interest and other attendant ethical violations. BCBSM respectfully requests that attorney David Ettinger and Honigman be disqualified from representation of Plaintiffs Health Alliance Plan of Michigan, HAP Preferred Incorporated, and Alliance Health and Life Insurance Company (“HAP”) and third parties Bronson Hospital, Charlevoix Hospital, Covenant HealthCare, Garden City Hospital, Karmanos Hospital, Marquette Hospital, McLaren Health Care, Metro Health, MidMichigan Health, Northern Michigan, Trinity Hospital, the University of Michigan Hospital, and the Michigan Health and Hospital Association in this and any related matter challenging most favored nations clauses in contracts between BCBSM and Michigan hospitals. In support of this motion, BCBSM relies upon the authorities and arguments set forth in the incorporated brief, and the declaration of ethics expert Richard Painter.

BCBSM’s counsel conferred with attorneys for Plaintiff entitled to be heard on this Motion, as required by Local Rule 7.1(a)(2)(A). BCBSM explained the nature and legal basis of the motion and requested, but did not obtain, concurrence in the relief sought.

Dated: October 23, 2014

Respectfully submitted,

/s/ Todd M. Stenerson

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**DEFENDANT’S BRIEF IN SUPPORT OF ITS MOTION FOR
DISQUALIFICATION OF ATTORNEY DAVID ETTINGER AND
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STATEMENT OF ISSUES PRESENTED

1. Whether Honigman Miller Schwartz and Cohn, LLP, and Attorney David Ettinger should be disqualified from representation of Plaintiffs and third party witnesses in this and any related matters because their conflicts of interest and conduct give rise to the appearance of, or actual, impropriety and threaten BCBSM's right to a fair trial?

Defendant's Answer: Yes.

CONTROLLING AUTHORITY

Atmosphere Hospitality Mgmt. Servs., LLC v. Royal Realities, LLC,
No. 14-10299, 2014 WL 2938085 (E.D. Mich. June 26, 2014)

DeBiasi v. Charter Cnty. of Wayne,
284 F. Supp. 2d 760 (E.D. Mich. 2003)

El Camino Res., Ltd. v. Huntington Nat'l Bank,
623 F. Supp. 2d 863 (W.D. Mich. 2007)

Gaspar v. Dicks,
No. 08-13707, 2011 WL 5975067 (E.D. Mich, Nov. 29, 2011)

Nat'l Union Fire Ins. Co. v. Alticor, Inc.,
466 F.3d 456 (6th Cir. 2006), *vacated on other grounds*, 472 F.3d 436 (6th
Cir. 2007)

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Blue Cross Blue Shield of Michigan (“BCBSM”) hereby moves to disqualify Honigman Miller Schwartz and Cohn, LLP, and David Ettinger (collectively, “Honigman”) from representing plaintiffs in this case, Health Alliance Plan of Michigan, HAP Preferred, Incorporated, and Alliance Health and Life Insurance Company (collectively “HAP”), as well as any hospital witnesses Honigman also represents in two related cases pending before the Honorable Denise Page Hood. As demonstrated below, and in the expert declaration of Richard Painter, Honigman’s simultaneous and conflicting representations do not comply with the applicable standards of conduct for lawyers. Accordingly, disqualification is the only appropriate remedy.

INTRODUCTION

Since 2010, several antitrust cases have been filed challenging the use of most favored nations (“MFN”) provisions¹ in some of BCBSM’s hospital contracts (“MFN Litigations”). Plaintiffs in those litigations, including HAP in this newly-filed action, alleged that MFNs raised the prices of hospital services to insurers, resulting in reduced competition in the sale of commercial health insurance. But for the four years in which these cases have been pending, HAP’s new counsel Honigman, through Mr. Ettinger, has been on the other side of these cases, representing multiple hospitals and the Michigan Health and Hospital Association

¹ As used in these cases, an MFN between a hospital and insurer requires the hospital to give that insurer the best price for the hospital’s services.

as both defendants and witnesses. Throughout, Honigman argued that MFNs did not violate the antitrust laws, and Honigman's hospital clients testified under oath that the MFNs had no effect on prices charged to BCBSM's rival insurers.

While still representing those same hospitals, Honigman now makes the opposite claim. HAP now alleges (in a complaint signed and filed by Mr. Ettinger) that each of Honigman's hospital clients was party to a "provider agreement[] . . . [that] is a contract, combination and conspiracy within the meaning of Section 1 of the Sherman Act."² HAP also alleges that MFNs raised the prices hospitals charged BCBSM's rivals and resulted in hospitals, including Honigman's hospital clients, being overpaid.³ This directly contradicts Honigman's own prior arguments and its clients' sworn testimony and documents. Worse, Honigman demanded an illegal secret side payment of \$42 million dollars to HAP. Honigman asserted that if BCBSM did not make the payment, HAP would sue BCBSM. Honigman added that HAP's lawsuit would likely benefit from harmful evidence that Honigman suggested would be developed in a different MFN litigation—a litigation in which Honigman represents several hospital witnesses.

Honigman's conduct violates multiple ethical rules and puts Honigman squarely adverse to its own clients. It undermines the integrity of the judicial

² Compl. ¶ 69.

³ *Id.* ¶ 14.

process, prejudices BCBCM's right to fair proceedings, and violates Honigman's duty of loyalty to its clients. The only remedy is to disqualify Honigman and Mr. Ettinger from their overlapping and conflicting roles.

BACKGROUND

In October 2010, the Department of Justice ("DOJ") filed the first in a series of related cases alleging that MFN clauses in BCBSM's contracts with certain Michigan hospitals violated Section One of the Sherman Act.⁴ The DOJ case addressed two types of MFNs: (1) "equal to" MFNs, in which a hospital agreed to charge BCBSM prices no higher than those charged to any other insurer, and (2) differential MFNs (or "MFNDs", also called "MFN+"), in which hospitals agreed to charge BCBSM lower prices than those charged to any other insurer. Several follow-on lawsuits were filed following the DOJ case, all of which challenged the use of MFNs in hospital contracts. In these follow-on litigations, BCBSM was

⁴ The "MFN Litigations" include: (1) *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155-DPH-MKM (E.D. Mich.) ("DOJ Case"); (2) *The Shane Group, Inc., et al. v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14360-DPH-MKM (E.D. Mich.) ("Shane Group Case"); (3) *Frankenmuth Mutual Insurance Company v. Blue Cross Blue Shield of Michigan et al.*, No. 1:10-cv-14633 (E.D. Mich.); (4) *Michigan Regional Council of Carpenters Employee Benefits Fund et al. v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14887 (E.D. Mich.); (5) *The City of Pontiac v. Blue Cross Blue Shield of Michigan, et al.*, No. 2:11-cv-10276-DPH-MKM (E.D. Mich.) ("City of Pontiac Case"); (6) *Scott Steele et al. v. Blue Cross Blue Shield of Michigan*, No. 2:11-cv-10375 (E.D. Mich.); and (7) *Aetna Inc. v. Blue Cross Blue Shield of Michigan*, No. 11-cv-15346-DPH-MKM (E.D. Mich.) ("Aetna Case") (collectively, the "MFN Litigation"). Only the *Aetna* and *Shane Group* cases remain pending. All of the other cases were dismissed or consolidated.

generally the only defendant; however, two plaintiffs named various Michigan hospitals as additional defendants. Honigman represented many of the hospitals in the MFN Litigations, both as defendants and as third parties. Today, Honigman continues to represent these hospitals in the *Aetna* and *Shane Group* cases, the two MFN Litigations that are still pending. The history of the MFN Litigations reveals Honigman's conflict of interest and other misconduct.

I. Honigman Initially Represented Several Hospital Defendants in the MFN Litigations

Honigman—through Mr. Ettinger—first appeared in the MFN Litigations as counsel for a group of five Michigan hospital defendants in the *City of Pontiac* case (the “Hospital Defendants”).⁵ In that case, Plaintiffs alleged that the Hospital Defendants, along with other hospitals and BCBSM, unlawfully restrained trade in violation of federal and state antitrust laws by agreeing to include MFND provisions in their contracts. In a motion to dismiss, Mr. Ettinger argued that there was no violation of the antitrust laws because the agreements had no effect on the prices the hospitals charged other insurers:

If . . . a hospital had an MFN Plus differential of 20%, and it already charged other payors at least 25% more than Blue Cross, because they offered so much less volume, then an MFN Plus clause would have had no impact on payors ⁶

⁵ The Hospital Defendants represented by Honigman included Gratiot Community Hospital, Marquette General Hospital, Metro Health Hospital, Covenant HealthCare, and MidMichigan Medical Center.

⁶ *City of Pontiac*, No. 2:11-cv-10276, Dkt. 141, at 3.

Judge Hood subsequently dismissed the *City of Pontiac* complaint.

II. Honigman Represents Additional Michigan Hospitals as Fact Witnesses

The former Hospital Defendants remained key fact witnesses in the other cases after dismissal of the *City of Pontiac* case. Nearly every hospital in the State of Michigan received subpoenas for depositions and the production of documents in the MFN Litigations. Multiple hospitals retained Mr. Ettinger to respond to the subpoenas and represent them as third parties. As a result, Mr. Ettinger represents the following 12 hospitals and hospital systems: Bronson Hospital, Charlevoix Hospital, Covenant HealthCare, Garden City Hospital, Karmanos Hospital, Marquette Hospital, McLaren Health Care, Metro Health, MidMichigan Health, Northern Michigan, Trinity Hospital, and the University of Michigan Hospital. He also represents the Michigan Health and Hospital Association (“MHA”).⁷ (Collectively, these 13 clients are referred to as the “Hospital Clients.”) During his representation of the Hospital Clients, each provided documentary evidence and sworn deposition testimony. As is discussed further in section IV below, the

⁷ At the relevant time, BCBSM was required by state law to create model contracts for providers that were reviewed and approved by the Michigan Department of Insurance and Financial Services. *See, e.g.*, Final Order Approving Revised Hospital Provider Class Plan, In the matter of Hospital Provider Class Plan Determination Report pursuant to Public Act 350 of 1980, No. 13-031-BC (2013), *available at* http://www.michigan.gov/documents/difs/0,5269,7-303-20594_20598---Y_2013,00.html (then hit enter at the July 18, 2013 entry). The MHA provides input to BCBSM on its model hospital contract on behalf of the Michigan hospitals.

Hospital Clients directly and repeatedly contradicted the allegations HAP now advances.

III. Mr. Ettinger Begins Representing HAP and Demands that BCBSM Secretly Pay HAP \$42 Million

After three and a half years of intense litigation, on June 26, 2014, Judge Hood preliminarily approved a \$29 million settlement in the *Shane Group* class action.⁸ Notice was sent on June 30, 2014 and class members had nearly three months (until September 24, 2014) to file a claim, object, or opt-out. HAP was a large class member.

Shortly before expiration of the opt-out period, Mr. Ettinger sent a demand letter to BCBSM on behalf of HAP.⁹ Mr. Ettinger failed to copy Class Counsel on the correspondence. Mr. Ettinger stated that HAP would opt out of the *Shane Group* settlement and sue BCBSM unless BCBSM agreed to “reach a separate, confidential settlement . . . involving an additional payment *beyond the class recovery*.”¹⁰ To that end, he proposed a secret side deal in which HAP would submit a public claim against the *Shane Group* settlement fund for \$8 million but

⁸ *Shane Group v. BCBSM*, No. 2:10-cv-14360-DPF-MKM, Dkt. 151 (E.D. Mich. June 26, 2014). In this case, a class of subscribers, providers, and competitors alleged that MFNs in BCBSM’s hospital contracts were anticompetitive.

⁹ HAP was represented by a different law firm when it responded to discovery requests in the other MFN Litigations. BCBSM first became aware that Mr. Ettinger had begun representing HAP during the class opt-out period, and immediately raised its concern about Honigman’s multiple roles.

¹⁰ September 8, 2014 letter from lawyer David Ettinger to BCBSM counsel at 4 (emphasis added) (Ex. 1).

also, unknown to either the Court or Class Counsel, receive an additional hidden \$42 million payment from BCBSM.

Mr. Ettinger further warned BCBSM that, as HAP's counsel, he had a direct interest in seeing Aetna prevail at trial—a trial in which Aetna is seeking \$1 billion from BCBSM. Mr. Ettinger stated that HAP would likely benefit from “helpful evidence” that would be developed at trial in the *Aetna* case, and that he might even try to assert collateral estoppel if Aetna prevailed. Aware that Mr. Ettinger represented numerous key witnesses that might impact the outcome of the *Aetna* case, BCBSM was alarmed by the implications of Mr. Ettinger's statement and dual roles. Moreover, the timing of the letter maximized the pressure on BCBSM by delivering a short-fused ultimatum: “Of course, [the secret payment] would need to occur before the opt-out date.”¹¹

BCBSM rejected HAP's demand. HAP's demand would have required BCBSM to violate Federal Rule of Civil Procedure 23(e)(3) and, regardless, BCBSM was not willing to pay HAP anything other than what HAP could claim against the Settlement Fund. As BCBSM told Mr. Ettinger, Rule 23 requires parties to “‘identify any agreement made in connection’ with the settlement to the Court,” especially any agreements that “‘reveal additional funds that might have been paid to the class that are instead paid to selected claimants or their

¹¹ *Id.*

attorneys,”” which is exactly what HAP proposed through its counsel.¹² Secret payments to class members are not permitted.

IV. HAP Files a New Complaint Against BCBSM that Contradicts the Testimony of the Hospital Clients and Accuses Them of Being Parties to Illegal Agreements

Having failed in its attempt to obtain an improper payment from BCBSM, HAP opted out of the class settlement. HAP then filed a complaint, signed by Mr. Ettinger, that accused both the Hospital Defendants and BCBSM of violating the antitrust laws through the differential MFNs:

69. Each of the provider agreements between Blue Cross and a Michigan hospital containing an MFN plus provision is a contract, combination and conspiracy within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1.

71. Each of the agreements between Blue Cross and a hospital in Michigan containing an MFN plus clause unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.¹³

HAP’s Complaint is riddled with allegations contradicted by testimony from Mr. Ettinger’s Hospital Clients. For example, the Complaint alleges that the differential MFNs “increase[ed] the prices charged by hospitals to competing insurers, including HAP,” “[p]reventing HAP and other Blue Cross rivals from negotiating with hospitals to obtain lower prices,” and “created an incentive for providers to charge higher prices to Blue Cross (and to its self-insured customers

¹² See September 17, 2014 letter from BCBSM counsel to Mr. Ettinger at 1 (citing Manual for Complex Litigation, § 21.631 (4th ed. 2004)) (Ex. 2).

¹³ Compl. ¶¶ 69, 71 (emphasis added).

and subscribers paying copayments and deductibles) as well as to competitors.”¹⁴ But the Hospital Defendants testified otherwise.¹⁵ HAP also alleges that the purpose of the MFNs is “to protect [BCBSM’s] dominant position and thwart competition from HAP and other competitors.”¹⁶ But this claim is undermined by the testimony of the MHA—another Honigman Client.

BCBSM and its counsel raised the conflict with Mr. Ettinger prior to his filing of this action, but he saw “no conflicts.”¹⁷ BCBSM retained a national expert in ethics, Professor Richard Painter,¹⁸ to opine on whether the conduct at issue was consistent with applicable standards of professional conduct. Mr. Painter concluded that

[I]n my opinion Ettinger’s representation of HAP in this case violates the conflict of interest provisions in Rules 1.7 and 1.9 of the Michigan Rules of Professional Conduct because of his prior and current

¹⁴ Compl. ¶¶ 40, 48, 50(a).

¹⁵ The testimony was provided in the related *Shane* case and is confidential pursuant to the protective order in that case. BCBSM has separately moved to amend the protective order in the *Shane* case to allow disclosure of the specific testimony to the Court in this action and requested that the relevant entities consent to BCBSM filing their transcripts in this action. Upon modification of the *Shane* protective order or receipt of the relevant entities’ consent, BCBSM will supplement this motion with the actual testimony from the Hospital Clients.

¹⁶ Compl. ¶ 1.

¹⁷ September 18, 2014 letter from lawyer David Ettinger to BCBSM counsel at 2 (Ex. 3).

¹⁸ Richard Painter is currently the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School, is serving this year at Harvard University’s Safra Center for Ethics, and was formerly the chief ethics lawyer for the President and White House staff. Decl. of Richard Painter ¶ 1 (Ex. 4.) Mr. Painter’s full Curriculum Vitae is attached to his declaration at Exhibit A.

representation of twelve hospitals and the Michigan Hospital Association in substantially related litigation. I also conclude that Ettinger's proposed settlement of HAP's alleged claims against BCBSM during the pendency of a class action in which HAP was a class member violated Federal Rule of Civil Procedure 23 and Michigan Rule 8.4 (conduct prejudicial to the administration of justice).¹⁹

BCBSM now files this motion.

ARGUMENT

Honigman should be disqualified because its concurrent representations create a conflict of interest under Michigan Rule of Professional Conduct ("MRPC") 1.7.²⁰ Further, Honigman should be disqualified because, as a result of that conflict, Mr. Ettinger attempted to induce BCBSM's counsel to commit ethical infractions in violation of MRPC 8.4 and Honigman's conduct has shrouded the MFN Litigations in the appearance of impropriety. "The power to disqualify an attorney from a case is incidental to all courts, and a district court is obliged to consider unethical conduct by an attorney in connection with any proceeding before it."²¹ A motion to disqualify, while a serious request, is "the proper method

¹⁹ Decl. of Richard Painter ¶ 8 (Summary of Expert Opinion) (Ex. 4.)

²⁰ "The Michigan Rules of Professional Conduct . . . apply to proceedings before this Court pursuant to Eastern District of Michigan Local Rule 83.22(b)." *Gaspar v. Dicks*, No. 08-13707, 2011 WL 5975067, at *2 (E.D. Mich. Nov. 29, 2011).

²¹ *DeBiasi v. Charter Cnty. of Wayne*, 284 F. Supp. 2d 760, 770 (E.D. Mich. 2003). See also *Nat'l Union Fire Ins. Co. v. Alticor, Inc.*, 466 F.3d 456, 457–58 (6th Cir. 2006), *vacated on other grounds*, 472 F.3d 436 (6th Cir. 2007) ("Starting with *In re Mills*, 1 Mich. 392 (1850), Michigan has a long tradition of judicial oversight of

for a party to bring an alleged breach of ethical duties to the court's attention."²²

Opposing counsel has "a right and arguably a duty to call to the attention of the District Judge" a conflict of interest, even when that conflict exists as-between third parties.²³ Honigman cannot escape its ethical violations and must be disqualified.

I. Honigman Should Be Disqualified Because Its Multiple Representations Violate MRPC 1.7

Honigman's directly contradictory representations violate Michigan Rule of Professional Conduct 1.7 by placing Mr. Ettinger in a position where his ability to represent each client is "materially limited" by his "responsibilities to [the other]

the ethical conduct of its court officers" that includes disqualification of counsel where there is a conflict of interest).

²² *DeBiasi*, 284 F. Supp. 2d at 770. *Accord McCool v. Operative Plasterers' & Cement Masons' Int'l Ass'n of U.S. & Canada, AFL-CIO*, No. 13-13614, 2014 WL 635797 (E.D. Mich. Feb. 18, 2014) (a motion to disqualify is "the proper method for a party to bring to the court's attention an alleged conflict of interest or breach of ethical duty by opposing counsel").

²³ *Melamed v. ITT Cont'l Baking Co.*, 592 F.2d 290, 294 (6th Cir. 1979), *disapproved of on other grounds*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981). *Accord Gaspar*, 2011 WL 5975067, at 2 ("the judge and the parties have joint responsibility to guard interests that are actually threatened") (quoting *Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986)); *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156-57 (W.D. Wash. 2006) (holding that plaintiffs have standing for their disqualification motion by having "shown that the ethical conflict at issue here sufficiently impacts the 'just and lawful determination' of their claims and that the conflict involved is so intertwined with the current litigation that this Court must consider Plaintiffs' motion to disqualify Defendants' counsel"); Comment to MRPC 1.7 (2013) ("Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question.").

client[s]” and because he is simultaneously representing clients who are “directly adverse.”²⁴ “Loyalty is an essential element in the lawyer’s relationship to a client,”²⁵ and “[i]t is a well-established ethical principle that an attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute.”²⁶ Honigman should be disqualified because Mr. Ettinger’s concurrent representations²⁷ violate his ethical duties to his clients, and the Michigan ethics rules contain “appropriate standards against which to measure the propriety of an attorney’s conduct for the purpose of determining whether a lawyer should be disqualified in a particular case.”²⁸

A. Mr. Ettinger Violated MRPC 1.7(a) by Simultaneously Representing Multiple Clients with Directly Adverse Interests

Mr. Ettinger must be disqualified because his clients—HAP and the Hospital Clients—have adverse interests in violation of MRPC 1.7(a). Clients have adverse interests when they have opposite positions on the same relevant and material

²⁴ MRPC 1.7 (2013).

²⁵ Comment to MRPC 1.7 (2013).

²⁶ *El Camino Res., Ltd. v. Huntington Nat’l Bank*, 623 F. Supp. 2d 863, 876 (W.D. Mich. 2007) (quoting *Evans & Luptak, PLC v. Lizza*, 251 Mich. App. 187, 650 N.W.2d 364, 370 (2002)).

²⁷ Any conflict arising under MRPC 1.7 is imputed to the entire firm under MRPC 1.10, requiring Honigman’s disqualification.

²⁸ *Atmosphere Hospitality Mgmt. Servs., LLC v. Royal Realities, LLC*, No. 14-10299, 2014 WL 2938085, at *3 (E.D. Mich. June 26, 2014) (citing *Nat’l Union*, 466 F.3d at 457-58).

subject.²⁹ This is the “only prerequisite” to showing a conflict under Rule 1.7 in absence of a proper waiver.³⁰

Mr. Ettinger plainly violated MRPC 1.7(a). HAP alleges that the differential MFNs required hospitals—including the Hospital Defendants—“to charge HAP (and others) substantially more than Blue Cross,” which “reduced competition in the sale of health insurance” throughout Michigan in violation of the antitrust laws.³¹ Count 1 of HAP’s complaint specifically accuses each hospital with an MFND in its contract with BCBSM of (1) being party to “a contract, combination and conspiracy within the meaning of Section 1 of the Sherman Act”; and (2) having “unreasonably restrained trade in violation of Section 1 of the Sherman

²⁹ *Khan v. Cellco P’ship*, No 1:10-cv-118, 2011 WL 5042071, at *5 (S.D. Ohio Sept. 8, 2011); *see also* Mich. Bar Ass’n, Ethics Op. No. RI–218 (Aug. 16, 1994) (stating, “[t]o establish an ethical violation under Rule 1.7(a) . . . [t]he only prerequisites . . . are those clearly set forth in the rule itself; namely, representation of one client that is ‘directly adverse’ to another client without the consent of each client”). In *Khan*, the court was confronted with the ethical question of whether a lawyer can represent an ex-employee suing the company for wrongful termination if the lawyer also consulted with a current employee concerning whether she had a claim of sexual harassment against the employee that was fired. *Id.* The court held that the interests of each party were “clearly materially adverse . . . It is a classic case of ‘he said/she said’ which pits the interests of Ms. Wiles, Verizon’s main witness, directly against those of Mr. Khan.” *Khan*, 2011 WL 5042071, at *5.

³⁰ Mich. Bar Ass’n, Ethics Op. No. RI–218 (Aug. 16, 1994) (“To establish an ethical violation under Rule 1.7(a) . . . [t]he only prerequisites . . . are those clearly set forth in the rule itself; namely, representation of one client that is ‘directly adverse’ to another client without the consent of each client.”).

³¹ Compl. ¶ 3.

Act.”³² Thus, Honigman, on behalf of HAP, has publicly accused its own Hospital Clients of entering into contracts that violate Section One of the Sherman Act and apparently will try to prove as much in furtherance of HAP’s case. Honigman is harming one client to help another³³—a patent and obvious conflict—requiring disqualification.³⁴

B. Mr. Ettinger Violated MRPC 1.7(b) Because His Loyalties Are Divided Between HAP and His Hospital Clients

Mr. Ettinger’s clients have diametrically opposed interests, which precludes him from fully and fairly representing any of them. As HAP’s Complaint makes clear, Mr. Ettinger’s new client’s case requires him to undermine his Hospital Clients’ sworn testimony and written arguments. His loyalties are necessarily divided. Inevitably, one set of clients—whether the hospitals or HAP—will not receive the requisite commitment, dedication, and zeal in advocacy to which they are entitled from their counsel. MRPC 1.7(b) thus mandates disqualification:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person

³² *Id.* ¶¶ 69, 71.

³³ It makes no difference whether the hospitals could ultimately defeat any antitrust claim brought against them. Honigman’s public accusations against its clients are improper and likely caused them substantial harm to their reputations. *See* Decl. of Richard Painter ¶¶ 20-21 (Ex. 4). A lawyer certainly should not publicly accuse his or her clients of illegal conduct, nor make allegations inconsistent with those clients’ prior sworn testimony.

³⁴ *Atmosphere Hospitality Mgmt.*, 2014 WL 2938085, at *3; Decl. of Richard Painter ¶¶ 22-25 (Ex. 4).

This Rule often is applied to prohibit a representation during which the lawyer will be called upon to cross-examine a client/witness who is testifying against another client.³⁵ For example, in *Khan*, the court found that disqualification was appropriate where the credibility of a former client called as a witness was “squarely at issue . . . and places plaintiff’s counsel in the position of attacking a former client’s credibility in order to advance the case of the present client.”³⁶

Any trial in the HAP case will require testimony from hospital witnesses, including the Hospital Clients. Because the Hospital Clients have already testified that allegations in HAP’s complaint are untrue (notably, that the differential MFNs had no effect on prices, including HAP’s prices), it is impossible for Honigman to zealously represent HAP without cross-examining and attempting to impeach or undermine its Hospital Clients in discovery and at a HAP trial. Moreover, if there

³⁵ Mich. Bar Ass’n, Ethics Op. No., RI-239 (June 14, 1996); *See also* ABA Formal Op. 92-367 (Oct. 16, 1992) (“The Committee believes that as a general matter examining one’s own client as an adverse witness on behalf of another client, or conducting third party discovery of one client on behalf of another client, is likely (1) to pit the duty of loyalty to each client against the duty of loyalty to the other; (2) to risk breaching the duty of confidentiality to the client witness; and (3) to present a tension between the lawyer’s own pecuniary interest in continued employment by the client-witness and the lawyer’s ability to effectively represent the litigation client. The first two of these hazards are likely to present a direct adverseness of interest falling within Rule 1.7(a); all three may constitute material limitations on the lawyer’s representation, so as to come under Rule 1.7(b).”).

³⁶ *Khan*, 2011 WL 5042071, at *5; *see also El Camino*, 623 F. Supp. 2d at 876 (citing comment to MRPC 1.7 for the proposition that “a lawyer ordinarily may not act as advocate against the person the lawyer represents in some other matter, even if it is wholly unrelated”).

is a trial in the *Aetna* case, testimony from the Hospital Clients that is consistent with their prior sworn deposition testimony (and documents and data) would harm HAP's claims. As a result, "[i]t is impossible for the same lawyer to represent the hospitals in their testimony in the *Aetna* case – and to protect the hospitals' interests in that case, including their interest in providing accurate testimony – while zealously representing another client, HAP, that wants the hospitals' testimony to be as damaging as possible to BCBSM."³⁷ The conflict is even more acute here than in *Khan* because the Hospital Clients are current clients as opposed to former clients.³⁸

II. In Trying to Force BCBSM to Agree to a Secret Side Deal, Mr. Ettinger Solicited BCBSM's Participation in Perpetrating a Fraud on the Court in Violation of MRPC 8.4

Mr. Ettinger violated Michigan Rule of Professional Conduct 8.4 by pressing BCBSM to agree to a side deal related to the *Shane Group* class settlement that would be concealed from the Court, the class, and its counsel. Had

³⁷ Decl. of Richard Painter ¶ 28 (Ex. 4).

³⁸ See Mich. Bar Ass'n, Ethics Op. No. RI-218 (Aug. 16, 1994) (finding, "if the testimony of the client-witness is adverse to the interests of the lawyer's other client, a disinterested lawyer could not reasonably believe the representation would not be adversely affected and the lawyer is disqualified pursuant to MRPC 1.7(a)(1) and 1.7(b)(1)."). To the best of BCBSM's knowledge, the Ettinger Hospital Clients are current clients of Mr. Ettinger. See Ex. 3, at 2 (referring to a hospital as "one of my clients"). Even if, however, the Ettinger Hospital Clients are Mr. Ettinger's former clients, the analysis under MRPC 1.9 (Conflict of Interest: Former Client) yields the same outcome. Decl. of Richard Painter at ¶¶ 34-35 (Ex. 4). A conflict remains and Honigman's disqualification is warranted.

BCBSM acceded to HAP's demands, BCBSM's counsel would have violated the duty of candor under MRPC 3.3 by intentionally failing to disclose to the Court facts required under Federal Rule of Civil Procedure 23.

Federal Rule of Civil Procedure 23 requires parties to file a statement with the court disclosing all agreements made in connection to a proposed class action settlement.³⁹ Accordingly, the knowing failure to disclose such a side deal in the Rule 23(e) statement violates counsel's duty of candor.⁴⁰ It is therefore

³⁹ Federal Rule of Civil Procedure 23 provides in pertinent part:

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with a court's approval. The following procedures apply to a proposed settlement, voluntary dismissal or compromise:

* * *

(3) The parties seeking approval *must file a statement* identifying any agreement made in connection with the proposal.

(emphasis added). *See also* Manual for Complex Civil Litigation § 21.631 (4th ed. 2004) ("The spirit of [the Rule] is to compel identification of any agreement or understanding that might have affected the interests of class members by altering what they may be receiving or foregoing.") The Manual goes on to explain that disclosure is required when "[s]ide agreements might indicate, for example, that the settlement is not reasonable because they may reveal additional funds that might have been paid to the class that are instead paid to selected claimants or their attorneys." *Id.* *See also* Advisory Committee Notes to 2003 Amendments Subdivision (e) Paragraph (2), Federal Rule of Civil Procedure 23 (noting that Rule 23(e)(3) is "aim[ed] . . . at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others").

⁴⁰ MRPC 3.3; Comment to MRPC 3.3 (intentional "failure to make a disclosure [to the Court] is the equivalent of an affirmative misrepresentation"); Decl. of Richard

“professional misconduct” under MRPC 8.4 for any counsel to “knowingly induce” another lawyer to violate MRPC 3.3.⁴¹

Mr. Ettinger’s September 8, 2014 letter pressed BCBSM to agree to a secret payment to HAP of \$42 million in order to avoid disruption of the *Shane* settlement.⁴² BCBSM rejected the secret payment because it was illegal and unethical. BCBSM now faces the danger that Mr. Ettinger will use his overlapping representations to put BCBSM at “an unfair disadvantage in both the *Aetna* case and this new case brought by HAP.”⁴³ The Court should ensure that BCBSM faces no possibility of such harm by disqualifying Mr. Ettinger and Honigman from all representations in the MFN Litigations.⁴⁴

Painter ¶ 37-38 (Ex. 4) (“Secret material side deals between a defendant and a class member are not allowed, whether the agreement involves consideration exchanged for not objecting to the settlement, not opting out or anything else.”). *See also* ABA Model Rules of Professional Conduct 3.3 (Candor Toward the Tribunal).

⁴¹ MRPC 8.4 (“It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”); Decl. of Richard Painter ¶ 39 (Ex. 4).

⁴² Dan Champney, general counsel for HAP, was carbon copied on Mr. Ettinger’s letters. It is unclear whether Mr. Champney was an active participant in this conduct or was merely following the misguided advice of his outside counsel.

⁴³ Decl. of Richard Painter ¶ 49 (Ex. 4).

⁴⁴ Decl. of Richard Painter ¶ 30 (Ex. 4) (“A lawyer cannot appropriately represent witnesses in a case once that lawyer has implied that the evidence could develop a certain adverse way if the defendant in that case does not agree to a large cash settlement of a substantially related case.”).

III. Honigman's Conflict of Interest Creates the Appearance of Impropriety by Undermining the Fairness of the High Profile MFN Litigations

Honigman must be disqualified because its conflict of interest will shroud in impropriety all proceedings in the MFN Litigations. Courts have the “inherent authority” to disqualify an attorney “when there is a reasonable possibility that some specifically identifiable impropriety actually occurred”⁴⁵ or “for failing to avoid even the appearance of impropriety.”⁴⁶ In addition to the threat to BCBSM's ability to obtain a fair trial as a result of Mr. Ettinger's conduct, in a highly publicized case like the MFN litigations, “[c]ourts must be particularly sensitive to the feelings of lay people about what constitutes justice . . . [because] where the conduct of the parties and their attorneys is subject to public scrutiny, the need to avoid all appearance of impropriety is acute.”⁴⁷

Honigman's conflicts give rise to an appearance of, or actual, impropriety in at least two ways. First, Honigman has represented and will continue to represent

⁴⁵ *Atmosphere Hospitality*, 2014 WL 2938085 at *3 (quoting *Moses v. Sterling Commerce (Am.), Inc.*, 122 F. App'x 177, 183–84 (6th Cir. 2005)).

⁴⁶ *El Camino*, 623 F. Supp. 2d at 876 (quoting *IBM. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978)). See also *DeBiasi*, 284 F. Supp. 2d at 770 (“The power to disqualify an attorney from a case is incidental to all courts, and a district court is obliged to consider unethical conduct by an attorney in connection with any proceeding before it.”).

⁴⁷ *Blue Cross & Blue Shield of NJ v. Philip Morris, Inc.*, 53 F. Supp. 2d 338, 347 (E.D.N.Y. 1999). This case has received significant media attention and the Court has already recognized that it has a significant impact on the public interest. See *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155-DPH-MKM, Dkt. 221, at 6 (E.D. Mich. Oct. 11, 2012).

its Hospital Clients as they provide key testimony in the *Aetna* case.⁴⁸ Honigman's conflict is especially problematic here because, over the course of the MFN Litigations, the Hospital Clients provided testimony that not only refutes HAP's allegations but also negates Aetna's claims.⁴⁹ Regardless of whether Honigman (consciously or unconsciously) actually attempts to reshape or downplay the Hospital Clients' testimony, Honigman's representation of both HAP and the Hospital Clients creates an appearance of impropriety and impedes the fair administration of justice. Indeed, it would no doubt offend "the feelings of lay people about what constitutes justice" to watch a lawyer cross-examine (and attempt to impeach) a witness on the very testimony that he once counseled that witness to provide.⁵⁰

Second, Honigman is in a position to exploit the confidential information it obtained (both from clients, parties, and third parties) while representing the

⁴⁸ Decl. of Richard Painter ¶¶ 23-25 (Ex. 4).

⁴⁹ Decl. of Richard Painter ¶¶ 25, 29, 33 (Ex. 4).

⁵⁰ *Philip Morris*, 53 F. Supp. 2d at 347. This problem cannot be fixed by hiring a separate law firm to cross-examine the hospital witnesses. *See FMC Techs.*, 420 F. Supp. 2d at 1162. Nor can Mr. Ettinger avoid the problem by making a representation that he will cross-examine his witnesses in good faith. *See In re Cendant Corp. Securities Litig.*, 124 F. Supp. 2d 235, 243 (D.N.J. 2000) (holding that counsel's argument "that it is insulted by the suggestion that the duty of loyalty or confidentiality [to their clients] could be breached (even unconsciously) . . . is misplaced. . . . This inquiry concerns the possibility of such breaches occurring, not actual breaches of these duties. . . .").

Hospital Clients in the *City of Pontiac* case and the other MFN Litigations.⁵¹ Honigman's representations of hospitals in those litigations will be, at a minimum, "helpful in fashioning targeted discovery inquiries, exploiting weaknesses in settlement discussions, and addressing the merits of the . . . allegations."⁵² The question is not whether Mr. Ettinger actually obtained any confidential information from his Hospital Clients that he could now use to advance HAP's interests. He creates the appearance of impropriety and violates ethical rules simply by placing himself in a position where that is possible.⁵³

⁵¹ See *Trustees for the Flint Plumbing & Pipefitting Indus. Health Care Fund v. Premier Plumbing & Heating*, No. 07-cv-14443, 2008 WL 2858475 (E.D. Mich. July 23, 2008) (holding disqualification warranted where matters are substantially related because a "presumption arises [that an attorney] would use confidential information he acquired about [former client]" to "vigorously pursue his new client's interests"); *Barkley v. City of Detroit*, 204 Mich. App. 194, 202-04, 514 N.W.2d 242, 246 (1994) ("[T]he conflict of interest rules are a frank recognition that, human nature being what it is, a dual relationship involving adverse or conflicting interests, constitutes enormous temptation to take advantage of one or both parties to such relationship" and their purpose is "to condemn the creation and existence of the dual relationship instead of merely scrutinizing the results that may flow therefrom." (internal quotations omitted)).

⁵² *Atmosphere Hospitality*, 2014 WL 2938085, at *5.

⁵³ *Barkley*, 204 Mich. App. at 202-04 (application of conflict of interest rules does not turn on "scrutinizing the results" of the conflict); Decl. of Richard Painter ¶ 30 (Ex. 4) ("A lawyer cannot appropriately represent witnesses in a case once that lawyer has implied that the evidence could develop a certain adverse way if the defendant in that case does not agree to a large cash settlement of a substantially related case.").

IV. The Conflict of Interest Violates MRPC 8.4 by Prejudicing the Administration of Justice in the MFN Litigations

For all of the same reasons set forth in section III above, Honigman's conflict is also "prejudicial to the administration of justice" in violation of Rule 8.4.⁵⁴ As Mr. Painter explains the

most serious issues concerning Ettinger's conduct in these substantially related cases center around an unresolvable conflict of interest between his hospital clients and HAP. In all of these cases, the fundamental factual claim is that antitrust laws were violated when purchasers of health services such as HAP allegedly paid too much because of Michigan hospitals' MFN Plus contracts with BCBSM. For the same lawyer to stand on both sides of that factual claim is prejudicial to the administration of justice.⁵⁵

CONCLUSION

For the foregoing reasons, BCBSM respectfully asks that the Court disqualify Honigman from any further representation of HAP or the Hospital Clients in the MFN Litigations and HAP's newly-filed case.

Dated: October 23, 2014

Respectfully submitted,

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⁵⁴ MRPC 8.4 (2013). *See also Gaspar*, 2011 WL 5975067, at *2 (the conflict "clearly . . . call[s] in question the fair or efficient administration of justice.").

⁵⁵ Decl. of Richard Painter ¶ 51 (Ex. 4.)

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2014, I caused to be served the foregoing DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR DISQUALIFICATION OF ATTORNEY DAVID ETTINGER AND HONIGMAN MILLER SCHWARTZ AND COHN, LLP through the Court's ECF system.

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